

REPORTS OF CASES
IN THE
SUPREME COURT
OF
NEBRASKA.

JANUARY AND SEPTEMBER TERMS, 1895.

VOLUME XLV.

D. A. CAMPBELL,
OFFICIAL REPORTER.

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By D. A. CAMPBELL, REPORTER OF THE SUPREME COURT,
In behalf of the people of Nebraska.

THE SUPREME COURT

OF

NEBRASKA.

1895.

CHIEF JUSTICE,

T. L. NORVAL.

JUDGES,

A. M. POST,

T. O. C. HARRISON.

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A. H. BABCOCK.....Beatrice.
J. E. BUSH.....Beatrice.

Second District—

S. M. CHAPMAN.....Plattsmouth.

Third District—

CHARLES L. HALL Lincoln.
E. P. HOLMES.....Lincoln.
A. S. TIBBETS Lincoln.

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J. H. BLAIR Omaha.
E. R. DUFFIE.....Omaha.
A. N. FERGUSON Omaha.
M. R. HOPEWELL.....Tekamah.
W. W. KEYSOR.....Omaha.
C. R. SCOTT Omaha.

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ROBERT WHEELER Osceola.

Sixth District—

WM. MARSHALL Fremont.
J. J. SULLIVAN Columbus.

Seventh District—

W. G. HASTINGS.....Wilber.

Eighth District—

W. F. NORRIS.....Ponca.

Ninth District—

J. S. ROBINSON.....Madison.

Tenth District—

F. B. BEALI Alma.

Eleventh District—

A. A. KENDALL St. Paul.
J. R. THOMPSON.....Grand Island.

DISTRICT COURTS OF NEBRASKA.

v

Twelfth District—

H. M. SINCLAIR Kearney.

Thirteenth District—

WILLIAM NEVILLE North Platte.

Fourteenth District—

D. T. WELTY Cambridge.

Fifteenth District—

ALFRED BARTOW Chadron.

M. P. KINKAID O'Neill.

PRACTICING ATTORNEYS.

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BURNAM, HARRY E.
CRAPO, PHILIP A.

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NEWMAN, A. J.
VINSONHALER, D. M.

SUPREME COURT COMMISSIONERS.

(Laws 1893, chapter 16, page 150.)

SECTION 1. The supreme court of the state, immediately upon the taking effect of this act, shall appoint three persons, no two of whom shall be adherents to the same political party, and who shall have attained the age of thirty years and are citizens of the United States and of this state, and regularly admitted as attorneys at law in this state, and in good standing of the bar thereof, as commissioners of the supreme court.

SEC. 2. It shall be the duty of said commissioners, under such rules and regulations as the supreme court may adopt, to aid and assist the court in the performance of its duties in the disposition of the numerous cases now pending in said court, or that shall be brought into said court during the term of office of such commissioners.

SEC. 3. The said commissioners shall hold office for the period of three years from and after their appointment, during which time they shall not engage in the practice of the law. They shall each receive a salary equal to the salary of a judge of the supreme court, payable at the same time and in the same manner as salaries of the judges of the supreme court are paid. Before entering upon the discharge of their duties they shall each take the oath provided for in section one (1) of article fourteen (14) of the constitution of this state. All vacancies in this commission shall be filled in like manner as the original appointment.

SEC. 4. Whereas an emergency exists, this act shall take effect and be in force from and after its passage and approval.

Approved March 9, A. D. 1893.

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The syllabus in each case was prepared by the judge or commissioner writing the opinion.

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF NEBRASKA.

JANUARY TERM, A. D. 1895.

PRESENT:

HON. T. L. NORVAL, CHIEF JUSTICE.

HON. A. M. POST,
HON. T. O. C. HARRISON, } JUDGES.

HON. ROBERT RYAN,
HON. JOHN M. RAGAN, } COMMISSIONERS.
HON. FRANK IRVINE, }

CLEARWATER BANK V. MARTIN KURKONSKI.

FILED MAY 1, 1895. No. 5928.

1. **Review: VALIDITY OF STATUTE: CONSTITUTIONAL LAW:**
QUESTIONS NOT PRESENTED BELOW. Where a statute is claimed to be invalid on the ground that it was not enacted in the constitutional mode, such invalidity must be presented by the pleadings or in some other form in the trial court to be of any avail here. Such objection cannot be raised for the first time in the appellate court.
2. **Constitutional Law: CHATTEL MORTGAGES: SATISFACTION.**
That portion of section 15, chapter 32, Compiled Statutes, which gives to the mortgagor of chattels a right of action to recover

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the sum therein prescribed as liquidated damages for a failure of a mortgagee or his assignee to enter satisfaction of record of a chattel mortgage which has been paid within ten days after being thereto requested, does not conflict with section 3, article 1, nor with section 5, article 8, of the constitution of this state. *Graham v. Kibble*, 9 Neb., 182, followed.

3. **Chattel Mortgages : SATISFACTION : DEMAND : ACTION FOR PENALTY.** A demand must be made upon the mortgagee or his assignee for the satisfaction of a mortgage, before an action can be maintained to recover the fixed sum named in said section 15.

4. ——— : ——— : ——— : ———. The entry of satisfaction after the statutory period will not defeat such an action.

ERROR from the district court of Antelope county.
Tried below before ALLEN, J.

The facts appear in the opinion.

Robertson, Wigton & Whitham, for plaintiff in error :

The amount sued for is a penalty. In an action for damages the true measure of plaintiff's recovery is the damage actually sustained. (*Atchison & N. R. Co. v. Baty*, 6 Neb., 40; *Boyer v. Barr*, 8 Neb., 71; *Roose v. Perkins*, 9 Neb., 315; *Riewe v. McCormick*, 11 Neb., 264; *Boldt v. Budwig*, 19 Neb., 745.)

Satisfaction having been entered before actual damages were sustained and before suit was brought, there can be no recovery for the penalty. (*Dickenson v. State*, 20 Neb., 81.)

The court should have instructed the jury that the demand for satisfaction of the mortgage should be direct, and not dependent upon a contingency or future event. (*Ewbanks v. Ashley*, 36 Ill., 177.)

S. D. Thornton and *O. A. Williams*, contra :

The penalty is incurred by a failure to enter the satisfaction within the proper time after request, and a subsequent entry of satisfaction, even before suit is brought for

the penalty, does not release the defendant from liability. (*Deeter v. Crossley*, 26 Ia., 180; *Hall v. Hurd*, 40 Kan., 740.)

NORVAL, C. J.

This action was brought by Martin Kurkonski against the Clearwater Bank under section 15, chapter 32, of the Compiled Statutes, to recover \$50, the fixed damages therein provided for the failure and refusal of a mortgagee to release and discharge a chattel mortgage of record after the debt has been paid. The trial resulted in a verdict and judgment against the bank for the amount above stated.

The first point argued in the brief is that said section 15, in so far as it imposes a fixed sum for failure to discharge a chattel mortgage, is unconstitutional. The section was originally section 74, chapter 43, of the Revised Statutes of 1866, entitled "Real Estate." It made provision how and when a mortgage upon chattels may be renewed. The section was amended in 1879 (Laws, 1879, p. 108) so as to read as follows:

"Sec. 74. Such clerk shall also enter in a book to be provided by him for that purpose the names of all the parties to such instruments, arranging the names of mortgagors alphabetically, and shall note thereon the time of filing such instrument or copy. Such mortgage when satisfied may be discharged by an entry by the mortgagee or his agent on the margin of such index, which shall be attested by the clerk without fee, and the original instrument or copy so filed shall be returned to the mortgagor."

It was carried into the compilation of the statutes of 1881 as section 15, chapter 32, entitled "Frauds," and it was amended as such in 1885. Since then there have been no changes, and as now existing it is as follows:

"Sec. 15. Such clerk shall also enter in a book to be provided by him for that purpose the names of all the parties to such instrument, arranging the names of such

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mortgagors alphabetically, and shall note thereon the time of filing such instrument or copy. Such mortgage when satisfied shall be discharged by an entry by the mortgagee, his agent or assignee on the margin of such index, which shall be attested by the clerk without fee; *Provided, also,* That the county clerk may discharge a mortgage on the presentation or receipt of an order in writing, signed by the mortgagee thereof and attested by a justice of the peace or some officer with a seal. Any mortgagee, assignee, or their legal personal representatives, after full performance of the conditions of the mortgage, who, for the space of ten (10) days after being requested, shall refuse or neglect to discharge the same as provided in this section, shall be liable to the mortgagor, his heirs, or assigns in the sum of fifty (\$50) dollars damages; and also for all actual damages sustained by the mortgagor, occasioned by such neglect or refusal, said damages to be recovered in the proper action."

It is urged that the legislature of 1885 injected into the statute the provision imposing the sum of \$50 in the nature of liquidated damages for failure to discharge a chattel mortgage, which is a new subject of legislation, not covered by the original section or the first amendment thereof, but one which is entirely foreign to the title of the last amendatory act, hence the provision is unconstitutional and void. We are relieved from the necessity of passing upon the validity of the law at this time, *i. e.*, whether it was enacted in the mode prescribed by the constitution, since no such question was raised in the court below, either by the pleadings or upon the introduction of the testimony. (*Burlington & M. R. R. Co. v. Saunders County*, 16 Neb., 123; *Pill v. State*, 43 Neb., 27; *Vose v. Cockcroft*, 44 N. Y., 415; *Delaney v. Brett*, 51 N. Y., 78.) The bank having made no objection to the constitutionality of the statute in the trial court, it must be held to have waived it.

The next point made is that the measure of recovery is

the amount of loss incurred, and no actual damages having been proved, there can be no recovery in this case. If the petition had been framed under the clause of the statute allowing the mortgagor to collect the actual damages sustained, the plaintiff would be limited in his recovery to such sum as would fully compensate him for his injury or loss, and it could not be increased by awarding punitive or exemplary damages. But such is not the form of the action. The suit is brought alone to recover the sum fixed by the statute for the failure to discharge a mortgage, and it was not necessary to prove upon the trial the amount of pecuniary injury suffered. The fact that the act gives the money, when recovered, to the party injured, does not make the law conflict with the provisions of section 5, article 8, of the state constitution. (*Graham v. Kibble*, 9 Neb., 182.) It was admitted upon the trial that on the 6th day of August, 1889, the plaintiff below executed and delivered to the bank his promissory note for \$27.25, due on the 6th day of the following November, and at the same time secured the payment thereof by giving a mortgage upon certain personal property owned by the mortgagor. The mortgage was duly filed in the office of the county clerk of Antelope county on the day following its execution, and by him indexed as required by law. The indebtedness secured by said mortgage was fully paid to the bank on November 1, 1889, and the mortgage was released of record on January 29, 1890, or one day prior to the commencement of this action. The plaintiff testified that at the time he paid the note he requested Mr. Smith, the cashier of the bank, to release the mortgage, and that the latter promised so to do, and that on the 8th of January, 1890, he again demanded of Mr. Smith that the mortgage be discharged of record. J. C. Smith testified that the agreement with the plaintiff was that he (the witness) was to release the mortgage the first time he went to Neligh, and that the plaintiff expressed himself satisfied with that ar-

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rangement; that no other demand to have the mortgage discharged was ever made. Mr. Smith is corroborated by the testimony of George Newer. The only controversy upon the facts is as to whether a discharge of the mortgage was demanded of the officers of the bank, and the conflict in the testimony upon that point was properly left to the jury to decide, and they resolved it against the bank, which they were warranted in doing upon the plaintiff's testimony alone, if they believed it to be true. Undoubtedly it was necessary for the plaintiff to prove a demand before an action could be maintained to recover the damages named in the statute. (*Hall v. Hurd*, 40 Kan., 740; *Deeter v. Crossley*, 26 Ia., 180.) A careful consideration of the record convinces us that the evidence is sufficient to authorize a finding that satisfaction of the mortgage of record was unconditionally demanded more than ten days prior to the bringing of this suit, and that there is no error in the instructions upon that branch of the case. Under the statute it was the duty of the bank to release the mortgage upon the payment of the debt thereby secured, whether a demand was made therefor or not, but, as stated above, the penalty did not attach until after demand and a failure to comply therewith within ten days. True, satisfaction was entered in this case the day before the action was brought, but that will not defeat a recovery of the penalty which had already attached. (1 Jones, Mortgages, sec. 990; *Deeter v. Crossley*, *supra*; *Hall v. Hurd*, 40 Kan., 740.) There is no reversible error in the record, and the judgment is

AFFIRMED.

PEORIA MANUFACTURING COMPANY V. E. T. HUFF
ET AL.

FILED MAY 1, 1895. No. 6408.

1. **Negotiable Instruments: ACCOMMODATION MAKER.** An accommodation maker is one who executes commercial paper without consideration in order to enable the payee, or holder, to thereby obtain credit.
2. ———: ———: **PRINCIPAL AND SURETY.** One who executes a promissory note as surety for another is not an accommodation maker.
3. ———: ———: **ADMISSION OF EVIDENCE.** Rule applied to evidence in support of several signers claiming to be accommodation makers.
4. ———: ———: ———: **REVIEW.** A judgment will not be reversed on account of error in the admission of evidence not prejudicial to the party complaining.

ERROR from the district court of Lancaster county.
Tried below before STRODE, J.

Atkinson & Doty, for plaintiff in error.

Davis & Hibner, Field & Holmes, and J. E. Philpott,
contra.

POST, J.

This was an action by the plaintiff in error, the Peoria Manufacturing Company (hereafter called the "Manufacturing Company"), against F. P. Lawrence, E. S. Hawley, and E. T. Huff on their joint promissory note for \$2,000, dated January 22, 1891, due sixty days after date. The plaintiff recovered in the district court for Lancaster county against Lawrence, but there was a verdict and judgment therein in favor of the other defendants, from which both Lawrence and the Manufacturing Company have prosecuted a proceeding by petition in error to this court.

The defendants below answered separately, but alleging substantially the same defenses, viz.: (1) That the note in suit was executed at the instance and special request of the Manufacturing Company, and for no consideration whatever, but for the sole purpose of enabling said company, the payee thereof, to obtain credit in the city of Peoria, and that in consideration of the execution of said note for the purpose aforesaid the payee thereof agreed to protect and keep the defendants harmless on account thereof; (2) that on the 22d day of January, 1891; the Lawrence Implement Company, a Nebraska corporation whose principal place of business was in the city of Lincoln, executed its note in favor of the plaintiff in the sum of \$2,000, due one day after date; that said last mentioned note was delivered to and accepted by the plaintiff in full satisfaction of the note sued on; that on the 9th day of March, 1891, an action was commenced by the plaintiff against the implement company on its said note, in which an order of attachment was issued and served by the seizure of the property of the defendant therein of the value of \$—; that on the day following, to-wit, March 10, final judgment was entered in said action against the implement company for the amount of said note, accompanied by an order for the sale of the property previously attached in satisfaction thereof; that said judgment remains in full force and no steps have been taken by the plaintiff to enforce the same by the sale of the attached property or otherwise.

It is shown by the evidence that on and prior to the 22d day of January, 1891, said implement company, of which the defendants below were officers, said Lawrence being the president and general manager, was indebted to the plaintiff in the sum of \$2,000, represented by a note of that amount, maturing on the day last mentioned. The plaintiff having been advised by the implement company through its president, Mr. Lawrence, that it would be unable to

pay said note when due, sent a representative to Lincoln, who agreed to an extension, provided said company would give individual signers instead of the note last mentioned. This proposition was accepted by Mr. Lawrence in behalf of the implement company, and in pursuance of that agreement the note in suit was prepared by Mr. Davis, the plaintiff's agent, and signed by Lawrence, and on the same day, or the next, by Hawley and Huff. Upon the delivery of said note to Davis the latter surrendered to the implement company its matured note and received from Lawrence the company's check for the interest thereon.

We will first consider the questions presented by the petition in error of the Manufacturing Company, which requires an examination of the evidence so far as it relates to the defendants severally. Mr. Huff testified in his own behalf that Lawrence and Davis, the plaintiff's agent, visited him at his office for the purpose of having him sign the note which had been previously executed by both the other makers and which Lawrence said was an accommodation note for the Manufacturing Company. Referring to his conversation with Davis on that occasion he testified as follows:

Q. For what purpose did he want it [the note] ?

A. Accommodation paper to help themselves out.

Q. To help themselves out ?

A. To help themselves out in credit I suppose.

Q. At that time were you personally indebted to the Peoria Manufacturing Company ?

A. No.

Q. On his representation did you sign it ?

A. I did.

Q. What else, if anything ? That the Peoria Manufacturing Company would take care of the note ?

A. Yes, sir; he represented that they would; that it would cost me nothing, but would help them out.

Q. Do you mean the note sued on in this case ?

A. I do.

And on cross-examination he testified :

Q. Do you know whether the Peoria Manufacturing Company was insisting upon payment or security for money owing to it by the Lawrence Implement Company?

A. I do not.

He is contradicted by Mr. Davis, who testified that the consideration for the note was the extension allowed on the past due paper of the implement company. The claim of the defendants may to us seem unreasonable, but the evidence adduced in support thereof appears to have satisfied the jury that the note was given solely for the accommodation of the plaintiff. An accommodation note or bill, within the meaning of the law merchant, is one made or accepted not upon a consideration, but for the purpose of enabling the payee or holder to obtain credit. (*Pollard v. Huff*, 44 Neb., 892, and authorities cited.) The facts, as testified to by the defendant, bring the transaction clearly within the foregoing definition, and it was the province of the jury to determine the question of his credibility as a witness, and their finding, bearing as it does the approval of the trial judge, should not be disturbed in this proceeding.

It is also alleged that the court erred in admitting the record and files in the action of this plaintiff against the implement company, showing the order for the sale, in satisfaction of the judgment therein, of a large amount of property, real and personal. It is not contended that the judgment in that case is of itself a defense to this action, and no such claim was made at the trial before the district court. The record appears to have been admitted upon the theory that the prosecution to judgment of an action on the note of the implement company was a circumstance tending to support the claim that said note was received by the plaintiff in satisfaction of the note in suit. But assuming its admission to be error, we cannot on the record before us

say that it is in any sense prejudicial to the plaintiff. The fact that an order had been entered in that action for the sale of a large amount of property might have prejudiced the plaintiff with the jury but for the further undisputed fact that said property had all been sold and the proceeds thereof applied in satisfaction of a prior attachment in favor of the Lincoln National Bank. In the absence of a showing of error prejudicial to the plaintiff, the judgment in favor of the defendant Huff must be affirmed.

We will now examine the evidence upon which the judgment as to Hawley rests. His version of the transaction appears from his direct examination as follows:

Q. Where were you when you signed that note?

A. I think I was at the Lincoln Hotel.

Q. Were you indebted at the time you signed that note to the Peoria Manufacturing Company?

A. No, sir.

Q. State how you happened to sign it.

A. Mr. Lawrence brought the note to me and said that Mr. Davis wanted it signed by the individual members. (Objection. Overruled. Exception.) Mr. Lawrence brought the note over to me and said Mr. Davis wanted it signed up by himself, Mr. Huff, and myself. I objected to signing the note. I did not see any necessity of putting the individual names to any note, and he said it would be an accommodation to Mr. Davis, and would give us no trouble. They could use it in that shape and could not use the company's name.

Q. Did you afterwards see Mr. Davis?

A. I saw Mr. Davis at the hotel.

Q. Was anything further said at that time?

A. I don't think there was anything further said about the note.

The foregoing evidence does not bring the witness within the rule stated, or entitle him to the protection of an accommodation maker. Comment upon the candid testi-

State v. Moore.

mony of this defendant is unnecessary. It is sufficient that his obligation is that of a surety for the implement company, and that as to him there is an entire failure of proof of the essential allegations of the answer, for which the judgment in his favor must be reversed.

We come now to a consideration of the judgment in favor of the Manufacturing Company against Lawrence. There can be no doubt from the evidence in the record, including the written correspondence conducted by said defendant relating to the note maturing January 22, 1891, that the note in suit was intended as an extension of the indebtedness represented by the note first mentioned, and that the relation of the defendant named to the plaintiff is that of a surety for the implement company.

There are other allegations of error which relate to rulings during the course of trial, but they do not require further notice, for the reason that they could not have prejudiced the rights of the defendant, since, as we have seen, the court might properly have directed a verdict against him upon his own evidence.

Judgment affirmed as to defendant in error Huff and plaintiff in error Lawrence, and reversed as to defendant in error Hawley.

JUDGMENT ACCORDINGLY.

STATE OF NEBRASKA, EX REL. SCHOOL DISTRICT NUMBER SIX, THURSTON COUNTY, ET AL. V. EUGENE MOORE, AUDITOR OF PUBLIC ACCOUNTS.

FILED MAY 1, 1895. No. 7580.

1. **Construction of Statutes.** In the interpretation or construction of statutes, ascertainment of the intention of the legislature is the end or purpose to be accomplished.

State v. Moore.

2. ———. Where a law is plain and certain in its terms and free from ambiguity, a reading suffices and no interpretation is needed or proper.
3. ———. Statutes which authorize the issuance of bonds by the minor political subdivisions of the state are subjects for strict construction when an interpretation is necessary, and where, from a careful study and analysis of the whole act and its several parts, the meaning and intent is doubtful, the doubt should be resolved in favor of the public or taxpayers.
4. **School Districts: ISSUANCE OF BONDS: PAYMENT OF WARRANTS.** The act approved March 30, 1887 (Session Laws, 1887, p. 100, ch. 9), entitled "An act to authorize counties, precincts, townships, or towns, cities, villages, and school districts to compromise their indebtedness and issue new bonds therefor," held, not to empower a school district to issue its bonds and deliver them to parties in compromise, or to take the place, of an indebtedness evidenced by school district warrants or orders.

ORIGINAL application for *mandamus* to compel the auditor of public accounts to register certain bonds issued by the school district to secure the payment of indebtedness evidenced by its warrants owned by the State Bank of Pender. *Writ denied.*

James H. Macomber, for relators cited: 1 Dillon, Municipal Corporations, sec. 65; *County of Scotland v. Thomas*, 94 U. S., 682; *County of Cass v. Gillett*, 100 U. S., 585; *County of Ralls v. Douglas*, 105 U. S., 728; *Commissioners of Jefferson County v. People*, 5 Neb., 127; *Lancaster County v. Trimble*, 33 Neb., 121; *State v. Babcock*, 25 Neb., 504; *Singer Mfg. Co. v. Fleming*, 39 Neb., 684; *People v. McCallum*, 1 Neb., 182; *State v. Ream*, 16 Neb., 681.

A. S. Churchill, Attorney General, and *W. S. Summers*, Deputy Attorney General, contra, cited: *City of Tecumseh v. Phillips*, 5 Neb., 305; *Messinger v. State*, 25 Neb., 674; *State v. Lancaster County*, 6 Neb., 474; *Holmberg v. Hauck*, 16 Neb., 337; *Touzalin v. City of Omaha*, 25 Neb., 817; *State v. Hurds*, 19 Neb., 316; *Ives v. Norris*, 13 Neb., 252; *Burlington & M. R. R. Co. v. Saunders County*, 9 Neb., 507.

HARRISON, J.

It appears from the application for a writ of *mandamus* in this action that school district No. 6 of Thurston county, one of the relators, had contracted an indebtedness of \$1,365.26, and had issued warrants evidencing the indebtedness, of which the State Bank of Pender, also a relator, had become the owner by purchase. No question is raised in the pleadings of the good faith of either the issuance of the warrants by the school district or their acquisition by the bank, nor is their validity attacked. The school district was unable to pay the amount due the bank upon the warrants, and, as a result of negotiations between its officers and the bank, it was agreed that the school district would issue its bonds in the sum of \$1,250, which the bank would receive in full of the indebtedness. The bonds were issued and the warrants held by the bank were surrendered and canceled. The bonds were presented to Hon. Eugene Moore, auditor of public accounts, respondent herein, for registration, and, upon his refusal to register them, this action was brought in this court, the relief sought being to compel the auditor to comply with the relator's demand for registration of the bonds. The auditor demurred to the petition or application of relators and thus put in issue the authority of the school district to issue the bonds and the right of the parties to require them to be registered.

The law to which our attention is directed, and pursuant to the provisions of which the relators assert they acted in making the agreement, and which, it is claimed, empowered the school district to issue the bonds for the purpose and in the manner it did, was passed during the legislative session of 1887 (see Session Laws, 1887, p. 100, ch. 9), and reads, in the portion which we need notice, as follows:

"An act to authorize counties, precincts, townships, or towns, cities, villages and school districts to compromise their indebtedness and issue new bonds therefor.

* * *

"Section 1. That any county, precinct, township or town, city, village, or school district is hereby authorized and empowered to compromise its indebtedness in the manner hereinafter provided.

"Sec. 2. Whenever the county commissioners of any county, the city council of any city, the board of trustees of any village, or the school board of any school district shall be satisfied by petitions or otherwise that any such county, precinct, township, or town, city, village, or school district, is unable to pay in full its indebtedness, and two-thirds ($\frac{2}{3}$) of the resident taxpayers of such county, precinct, township, or town, city, village, or school district shall by petition ask that such county, precinct, township, town, city, or village, or school district to compromise such indebtedness, they are hereby empowered to enter into negotiation with the holder or holders of any such indebtedness of whatever form, scaling, discounting, or compromising the same.

"Sec. 3. Whenever satisfactory arrangements are made with the holder or holders or any of them of any such indebtedness, and upon a surrender of the same for cancellation or satisfaction, the county commissioners for and on behalf of any such county, precincts, townships, or towns, or the city council of any such city, or the board of trustees of any such village, or school board of any such school districts, shall upon petition of two-thirds ($\frac{2}{3}$) of the resident tax payers of such county, precinct, township, or town, city, village, or school district, shall have authority and they are hereby empowered to issue the bonds of such county, precinct, township, or town, city, village, or school district, to the holder or holders of the indebtedness so surrendered, canceled, or satisfied for the amount agreed upon, not exceeding the original indebtedness.

"Sec. 4. Before issuing bonds under the provisions of this act the board issuing the same shall by resolution enter upon its records, recite the number and denomination of the bonds to be issued, the rate of interest, and to whom and when payable. Such bonds shall be payable in not more than twenty (20) years from the date of their issue, or at any time before maturity at the option of such municipality. They shall bear interest at a rate not exceeding seven (7) per cent, nor the rate borne by the bonds surrendered, with interest coupons attached, payable annually or semi-annually," etc.

During a number of years school districts in this state issued bonds for certain purposes, by virtue of the right given them by law to borrow money, this court holding, when the question was presented to it for determination, that the power to issue bonds was implied from the authority conferred by statute to "borrow money." (*State v. School District*, 13 Neb., 78; also *State v. School District*, 13 Neb., 82.) There was some legislation on the subject of school district bonds, their issuance, registration, etc., during the legislative session of 1875 (Session Laws, 1875, pp. 118, 185), and in 1879 an act was passed by the legislature entitled "An act to provide for the issuing and payment of school district bonds," which repealed the former acts on the subject and provided for the issuance of bonds to obtain money, by the officers of school districts, for the purpose of purchasing a site for, and the erection thereon of, school houses and furnishing the same; that prior to the issuing of any bonds the subject of the bonding of the district must be submitted to the voters, and two-thirds of the qualified electors of the school district declare by their votes in favor of issuing the bonds; that a notice of such election be given at least twenty days prior to the day of the election; that no such vote be ordered unless pursuant to the request of a petition signed by at least one-third of the electors of the school district, presented to the district

board, suggesting that a vote be taken in relation to the issuance of bonds for the purposes specified in the petition and within the purposes stated in the act. This law of 1879 has been amended, but not so as to change its requirements in regard to presentment of a petition and the holding of an election being necessary to the authorization of an issue of bonds. There was also passed by the legislature of 1879 (Session Laws, 1879, p. 176) "An act to provide for the funding of outstanding school district bonds," which provided that any school district in the state of Nebraska which has heretofore voted and issued bonds which remain unpaid is authorized to issue bonds to be substituted and exchanged for the original bonds, at a rate not to exceed dollar for dollar, and further providing that no vote of the people be required to authorize the issue of the new bonds. This act was amended in 1893, but the amendment need not be further noticed here. In 1887 came the act under which the bonds over which this controversy has arisen were issued, and which we have hereinbefore quoted. We have shown the condition of our law in reference to the subject under consideration to the extent it appears in the foregoing statement, for the purpose, in the main, of establishing, as it does, that prior to the passage of the act of 1887 the power of the school district board to issue bonds was confined to instances where the legislature had authorized them to do so only when the proposition had first been submitted to and acted upon favorably by the body of the district, the voters, for at no time were the officers empowered to issue bonds except when the expenditure had the approval of the electors of the district, save in the funding act of 1879, and this only extended to bonds which had been previously voted and issued, the indebtedness evidenced by them having received the consideration and, by their votes, the approval of the electors of the district.

It is not contended by the relators that the bonds which

the auditor refused to register were issued pursuant to any election at which the proposition of their issuance was voted upon by the electors of the school district relator, but that they were executed and delivered strictly in accordance with the requirements of the act of 1887, and it is not controverted by respondent that the provisions of the law of 1887 were in every essential fulfilled by the district officers in the issuance of these bonds; hence, the main question for our determination is, are the provisions of the act of 1887 sufficiently broad to authorize the issuance of bonds by a school district to substitute or exchange for an indebtedness of the district other than a bonded indebtedness? The other points noticed are only incidental to this, and important alone inasmuch as they bear upon and affect its disposition. In the interpretation and construction of statutes one of the cardinal rules is that it is the intent of the law that is to be sought after, and, if possible, ascertained, and where the law is expressed in words which are clear and not ambiguous, and no doubt as to its purpose and meaning can arise from the language employed where to understand and know its intent it is but necessary to read, then there is no call for an interpretation, but where the intention and meaning of the law-makers as expressed in the statute enacted is uncertain or obscure, as in the one now under consideration, a bare reading will not suffice, and we are obliged to resort to a construction of its terms and provisions. This statute contemplates the issue of bonds by officers of certain governmental divisions and subdivisions of our state and necessarily carrying with it a resort to the power of taxation of the people to raise the funds to meet the indebtedness created by such action, in the majority of instances not accorded until the proposition involved is submitted to and approved by a vote of the electors of the particular political body or subdivisions whose tax bearers are to be affected thereby, and hence, agreeably to a well established rule, is to be strictly con-

strued, and where there is any doubt it must be resolved in favor of the public or taxpayers.

The first section of the act under discussion enumerates the particular bodies or municipalities to which power is granted, and contains the authorization to compromise indebtedness without designation of any particular kind of indebtedness. Section 2 provides for the presentation of a petition by two-thirds of the resident taxpayers of the county, city, town, or school district, etc., asking that such a compromise be made, and empowers the proper officers to negotiate with the holders of "any such indebtedness of whatever form, scaling, discounting, or compromising the same." The words "of whatever form," applied in explanation of the indebtedness and making it include, as given their natural and ordinary purport they do, any and all indebtedness, seem to make the intention in relation to what claims were in contemplation and referred to by the legislature passing the act, plain and certain, and if there were no statements in other portions of the law bearing upon this same point, we might well stop here, content with the determination to which it would lead us. Section 3 of the law authorizes the issuance of the bonds upon the surrender and cancellation or satisfaction of the indebtedness and presentment of a petition by two-thirds of the taxpayers requesting such action. It does not designate or indicate any particular kind of indebtedness, but refers to it in each instance by the use of the general term. In section 4, in referring to the bonds to be issued, it is stated: "They shall bear interest at a rate not exceeding seven (7) per cent, nor the rate borne by the bond surrendered;" thus, it would seem, clearly indicating that it was an indebtedness evidenced by bonds which the legislator had in mind when he framed and introduced the bill containing the act in question, and in contemplation of the legislative body when it passed the act. From a study of the body of the law we think it must be concluded that there is a doubt whether

the compromise of all kinds of indebtedness is intended to be authorized, or only those of a bonded nature. It is a well settled rule that if the meaning conveyed by the body of the act is uncertain or in doubt, resort may be had to the title, and more especially is this the rule in jurisdictions where, as in our state, there is a constitutional provision requiring the subject of every bill to be clearly expressed in its title. In the title of this act the subject was stated as follows: "An act to authorize counties, precincts, townships, or towns, cities, villages, and school districts to compromise their indebtedness and issue new bonds therefor." The portion which we desire mainly to notice is contained in the words, "and issue new bonds therefor," and more particularly to the two words, "new bonds." The principal object of the title of a bill is to convey to a person who reads it a general idea or knowledge of the contents of the act. To a person reading the title of this bill, the use of the word "new" in connection with word "bonds," and allowing to them their ordinary signification, as must be done, and referring back and viewing them, coupled with the other idea expressed in the title, *i. e.*, the compromise of the existing indebtedness, it seems clear that the natural thought would be bonds "new" for bonds "old," given the appellation "new" in the title because issued in place or renewal of bonds which would be designated by the opposing word "old." We then have the use in both title and act, of the general term indebtedness, which, without anything to extend or explain it, would include all kinds of indebtedness. In one section it is stated to be intended to cover indebtedness of whatever form, which would include the warrants or school orders held by the bank, and surrendered on the issuance of the bonds presented and which the auditor refused to register. On the other hand, we have the title stating that the act is to provide for new bonds which conveys the idea of compromising, replacing, or renewing other or old bonds, a statement in the

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text that the bonds issued shall not bear interest at a rate in excess of that borne by the bonds surrendered, which, to say the least, leaves us in doubt and renders it uncertain whether the law was intended by the legislature to empower the issuance of bonds in the manner stated therein for the compromise of an existing indebtedness other than in the form of bonds. Add to these the thought that there was no provision for submitting the proposition of the issuance of these bonds to a vote, it being the wise and wholesome general policy of our law to so submit such questions, involving, as they necessarily do, the levying of a tax, to the decision of the voters who must pay the tax, and further that such laws are the subject for strict interpretation, and if there is a doubt as to the intention, it must be resolved in favor of the taxpayers or public, and we are constrained to say that our conclusion is that the act we are considering did not empower the issuance of the bonds to replace the indebtedness consisting, as it did, of school warrants or orders, and the writ prayed for in this action must be denied.

WRIT DENIED.

NATHAN K. GRIGGS, APPELLANT, v. WILLIAM J. HARMON, APPELLEE.

FILED MAY 1, 1895. No. 6458.

Bill of Exceptions: AUTHORITY OF CLERK TO SIGN: REVIEW.

In this case there are presented only questions of fact which cannot be examined upon what purports to be a bill of exceptions signed by the clerk of the district court wherein judgment was rendered, for the reason that there was no showing of the sickness or absence of the presiding judge from his district, and because the parties litigant did not agree upon such bill. Following *Scott v. Spencer*, 42 Neb., 632.

APPEAL from the district court of Saunders county.
Heard below before BATES, J.

Samuel Rinaker, J. A. Smith and R. S. Bibb, for appellant.

Erick & Dolezal, contra.

RYAN, C.

This was an action to quiet title brought by appellant in the district court of Saunders county. There is presented no question other than of fact. These questions cannot be considered upon what is submitted as a bill of exceptions signed by the clerk of said court, for the reason that it was not shown that the said bill was settled by the clerk because of the absence or sickness of the district judge, and there was no agreement upon the bill of exceptions. There was a stipulation in which, however, the last mentioned requirement does not appear. It was in the following language: "It is hereby agreed by and between the plaintiff and defendant in this action that a bill of exceptions in this case may be settled, allowed, and signed by the clerk of said district court, and that the same may be so signed and allowed without service or notice to defendant, except that in case of amendments proposed to the bill of exceptions as the same now stands, notice of any such amendments shall be given by plaintiff to defendant if any such amendments shall be desired by the plaintiff to be made. The bill to be settled and signed as aforesaid within the time provided by law." Following the case of *Scott v. Spencer*, 42 Neb., 632, we must ignore the act of the clerk in assuming to settle the bill of exceptions. Since the pleadings amply justified the relief granted the appellee, the judgment of the district court is

AFFIRMED.

SOUTH OMAHA NATIONAL BANK, APPELLANT, v.
WRIGHT & BALDWIN ET AL., APPELLEES.

FILED MAY 1, 1895. No. 6312.

1. **Principal and Surety: INDEMNITY FOR SURETY.** Where a surety for the payment of a debt receives a security for his indemnity and to discharge such indebtedness, the principal creditor is in equity entitled to the full benefit of that security. *Richards v. Yoder*, 10 Neb, 429, followed.
2. **Subrogation.** The doctrine of subrogation is not administered by courts of equity as a legal right, but the principle is applied to subserve the ends of justice and to do equity in the particular case under consideration. It does not rest on contract, and no general rule can be laid down which will afford a test in all cases for its application. Whether the doctrine is applicable in any particular case depends upon the peculiar facts and circumstances of such case.
3. **Chattel Mortgages: INDEMNITY: SUBROGATION.** A surety on a note, to indemnify her against loss by reason of her suretyship, and also to secure the payment of a debt due to her from her principal, took from him a mortgage. The principal afterwards gave to the payee of the note signed by the surety a mortgage to secure its payment. This mortgage pledged the same property pledged to the surety and by the terms was made subject thereto. In a suit to foreclose the mortgage given to secure the note signed by the surety the latter answered and claimed a first lien on the mortgaged property to satisfy the debt owing her by her principal, and which was then due. *Held*, That the holder of the note signed by the surety should be subrogated to her lien on the mortgaged property

APPEAL from the district court of Douglas county.
Heard below before WALTON, J.

The facts are stated by the commissioner.

Charles Offutt, for appellant:

A creditor is in equity entitled to the benefit of any security for the payment of a debt given by the principal

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debtor to the surety, although the creditor did not originally rely upon the credit of such security or even know of its existence; and a creditor has an equitable right to be substituted to the benefit of any such security for a debt which the principal debtor has given to his surety. (Sheldon, Subrogation, sec. 154; *Richards v. Yoder*, 10 Neb., 431; *Curtis v. Tyler*, 9 Paige Ch. [N. Y.], 432; *Kinsey v. McDearmon*, 5 Cald. [Tenn.], 395; *Saffold v. Wade*, 51 Ala., 218.)

The bank's note on which Flora M. Wright is surety must be paid out of the proceeds of the mortgaged property before she can take anything under her other mortgage for one thousand dollars. (1 Pomeroy, Equity Jurisprudence, secs. 243, 275; *Fitzhugh v. Custer*, 4 Tex., 391; *Carr v. Clough*, 59 Am. Dec. [N. H.], 345; *Schley v. Dixon*, 71 Am. Dec. [Ga.], 121; *Polk v. Rose*, 89 Am. Dec. [Md.], 773; *Ten Eyck v. Holmes*, 3 Sandf. Ch. [N. Y.], 428; *Griffin v. Chase*, 36 Neb., 328; *Siebert v. True*, 8 Kan., 53.)

Slabaugh & Rush, contra, on the question of subrogation, cited: *Ohio Life Ins. & Trust Co. v. Reeder*, 18 O., 35; *Van Orden v. Durham*, 35 Cal., 145; *Newsom v. McLendon*, 6 Ga., 400; *Belcher v. Hartford Bank*, 15 Conn., 382; *Osborne v. Noble*, 46 Miss., 454; *Eastman v. Foster*, 8 Met. [Mass.], 19; *Jackson v. May*, 28 Ill. App., 305; *Robertson v. Baker*, 11 Fla., 232; *Cooper v. Jenkins*, 32 Beav. [Eng.], 337; *Cornwell's Appeal*, 7 W. & S. [Pa.], 308; *Keyes v. Brush*, 2 Paige Ch. [N. Y.], 311; *Pool v. Doster*, 59 Miss., 258.

RAGAN, C.

On the 7th of January, 1891, S. G. Wright and A. J. Baldwin executed and delivered their promissory note to the South Omaha National Bank for the sum of \$3,000, due in ninety days. This note Flora M. Wright signed as surety. October 3, 1891, Wright & Baldwin executed and

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delivered another note to the said bank for \$2,500, due thirty days after date. On the 10th day of January, 1891, Wright & Baldwin executed and delivered their note for \$1,000 to Flora M. Wright, due in ninety days. This note was given for money borrowed by Wright & Baldwin of Flora M. Wright. On the 9th of November, 1891, Wright & Baldwin executed and delivered to Flora M. Wright two chattel mortgages, and thereby conveyed to her certain personal property. One of these mortgages was given to secure the payment of the note of \$1,000, given to her on January 10, 1891, by Wright & Baldwin. The other mortgage was given her to indemnify and keep her harmless from any loss which she might sustain by reason of having signed as surety the note of Wright & Baldwin for \$3,000 dated January 7, 1891. These two mortgages were filed in the office of the county clerk of Douglas county at three o'clock and twenty minutes in the afternoon of the day of their execution. On the 9th of November, 1891, Wright & Baldwin executed and delivered a chattel mortgage to the South Omaha National Bank and thereby conveyed to said bank the same personal property covered by the mortgages given to Flora M. Wright. This mortgage to the bank was given to secure the payment of the note for \$3,000 dated January 7, 1891, and the note of \$2,500 dated October 3, 1891. The mortgage recited that it was given subject to the two mortgages given by Wright & Baldwin to Flora M. Wright, and it was filed in the office of the county clerk of Douglas county after the filing of the mortgages to Flora M. Wright. The South Omaha National Bank brought this suit in the district court of Douglas county to foreclose the chattel mortgage given to it by Wright & Baldwin, and they and Flora M. Wright as well were made parties to the action. Flora M. Wright filed an answer in the nature of a cross-petition, claiming that Wright & Baldwin were indebted to her in the sum of \$1,000, and interest thereon from January 10, 1891, on

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the promissory note of that date given her by them, and that to secure the payment of such indebtedness she was entitled to a first lien upon the mortgaged property by reason of the chattel mortgage executed to her thereon by Wright & Baldwin on November 9, 1891. Pending the action a receiver was appointed, who took charge of the mortgaged property and converted the same into cash. The district court found that there was due from Wright & Baldwin to Flora M. Wright, \$1,184.66; that there was due to the South Omaha National Bank from Wright & Baldwin and Flora M. Wright, \$3,446.66; and that there was due to the bank from Wright & Baldwin, \$2,672.97; and that to secure the payment of said several sums of money, the bank and Flora M. Wright were entitled to the proceeds of the sale of said property mortgaged to them by Wright & Baldwin. The district court, however, decreed that the amount found due Flora M. Wright was the first lien upon the mortgaged property or its proceeds, and that the amount due the bank from Wright & Baldwin and Flora M. Wright was a second lien upon such mortgaged property or its proceeds, and that the amount due the bank from Wright & Baldwin was a third lien upon such mortgaged property or its proceeds, and ordered the proceeds derived from the sale of said mortgaged property distributed accordingly. From this decree the bank has appealed.

The contention of the appellant is that the debt due to it from Wright & Baldwin as principals and Flora M. Wright as surety should have been declared a first lien upon the mortgaged property or its proceeds. This contention is an invocation of the equitable doctrine of subrogation, the argument of the bank being that it is entitled to be subrogated to all the claims against the mortgaged property acquired by Flora M. Wright by the mortgage given to her by Wright & Baldwin to secure the debt due from them to her, and to indemnify her for becoming surety

on their note to the bank. We think this contention must be sustained. The general rule is that a creditor is entitled to the benefit of all securities given by the principal debtor for the indemnity of his surety. (*Haven v. Foley*, 18 Mo., 136, 19 Mo., 632; *Ten Eyck v. Holmes*, 3 Sandf. Ch. [N. Y.], 428; *Van Orden v. Durham*, 35 Cal., 136.) In *Richards v. Yoder*, 10 Neb., 431, it was held: "Where a surety for the payment of a debt receives a security for his indemnity and to discharge such indebtedness, the principal creditor is in equity entitled to the full benefit of that security." (*Curtis v. Tyler*, 9 Paige Ch. [N. Y.], 432.)

This is a suit in equity. All the parties are before the court. It is undisputed that Flora M. Wright is surety for Wright & Baldwin to the bank on the \$3,000 note dated January 7, 1891. This note is past due and wholly unpaid. To secure its payment the bank has a lien upon certain chattels by virtue of a mortgage executed to it thereon by Wright & Baldwin; and Flora M. Wright, to indemnify her for signing this note as surety, has also a mortgage upon the same chattel property. She has also a mortgage upon this property to secure a debt due to her from Wright & Baldwin, but this debt is past due, is unpaid, and is held by her. She owes the bank, then, the \$3,000 note which she signed as surety. If her debt due from Wright & Baldwin be first satisfied out of the proceeds of the chattel property, the remaining money will be insufficient to discharge the debt owing by her and Wright & Baldwin to the bank. This would necessitate supplemental or further proceedings on the part of the bank against Mrs. Wright to recover the balance due on the note which she signed as surety for Wright & Baldwin. In other words, it would lead to a multiplicity of suits,—a result which a court of equity is always desirous of preventing when it can be done without injury or injustice to the parties.

The doctrine of subrogation is not administered by courts

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of equity as a legal right, but the principle is applied to subserve the ends of justice and to do equity in the particular case under consideration. It does not rest on contract, and no general rule can be laid down which will afford a test in all cases for its application. Whether the doctrine is applicable in any particular case depends upon the peculiar facts and circumstances of such case. The case at bar appears to us to be one which calls for the application of this doctrine. The record before us affords not even a suspicion that any injustice will be done Flora M. Wright by postponing the payment of her debt out of the proceeds of the sale of the chattel property to the payment of the debt of Wright & Baldwin to the bank, for which she is also liable. This debt is her debt. The property which has been pledged to her to indemnify her for contracting this debt and to secure to her the payment of the \$1,000 loaned Wright & Baldwin is also pledged to secure the payment of the debt of Wright & Baldwin for which she is surety. To apply this mortgaged property then to the payment of Wright & Baldwin's and Flora M. Wright's debt before applying it to the payment of Wright & Baldwin's debt to Flora M. Wright is but to do simple justice. We conclude, therefore, that out of the proceeds of the mortgaged property the district court should have, in this particular case, ordered payments to be made as follows: (1) The costs of the suit, including expenses of the receiver; (2) to the appellant, the amount due to it from Wright & Baldwin and Flora M. Wright; (3) to Flora M. Wright, the amount due to her from Wright & Baldwin; (4) the amount due to the appellant from Wright & Baldwin. The decree of the district court is reversed and the cause remanded for further proceedings in accordance with this opinion.

REVERSED AND REMANDED.

SOUTH OMAHA NATIONAL BANK V. FARMERS & MERCHANTS NATIONAL BANK OF FREMONT, NEBRASKA,
ET AL.

FILED MAY 1, 1895. No. 6271.

1. **Appearance: DEFINITION.** An appearance is special when its sole purpose is to question the jurisdiction of the court. It is general if the party appearing invokes the power of the court on any question other than that of jurisdiction. Whether it is general or special is to be determined by an examination of the substance of the pleading, and not by its form.
2. **Garnishment: VENUE.** Under our Code, an order of garnishment cannot be issued to a county other than that in which the principal action is brought.

ERROR from the district court of Douglas county. Tried below before SCOTT, J.

The opinion contains a statement of the case.

Charles Offutt, for plaintiff in error:

The motion filed by the garnishee constituted a general appearance and a waiver of its objections to jurisdiction. (*Porter v. Chicago & N. W. R. Co.*, 1 Neb., 14; *Aultman v. Steinan*, 8 Neb., 109; *Klopp v. Water-Works Co.*, 34 Neb., 808; *Bucklin v. Strickler*, 32 Neb., 602; *Whitney v. Lehmer*, 26 Ind., 503; *Peck v. Barnum*, 24 Vt., 75; *Reed v. Fletcher*, 24 Neb., 451.)

The district court of Douglas county acquired jurisdiction by the issuance of the order of attachment to Dodge county. The ancillary action of attachment was thus brought in Dodge county, and the garnishee was properly served there. (*Reed v. Maben*, 21 Neb., 696; *Blue Valley Bank v. Bane*, 20 Neb., 300; *Moore v. Stainton*, 22 Ala., 831; *Conahan v. Cullin*, 2 Dis. [O.], 1; *Toledo, W. & W. R. Co. v. Reynolds*, 72 Ill., 487; *Peck v. Barnum*, 24 Vt., 75;

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Whitney v. Munroe, 19 Me., 42; *Bank of Augusta v. Conrey*, 28 Miss., 667; *Bryan v. Lashley*, 21 Miss., 284; *Barnes v. Patterson*, 6 H. & J. [Md.], 182; *Perkins v. Norwell*, 6 Humph. [Tenn.], 151; *Mansfield v. New England Express Co.*, 58 Me., 38; *Northfield Knife Co. v. Shapleigh*, 24 Neb., 638; *Beamer v. Winter*, 21 Pac. Rep. [Kan.], 1078; *Woodward v. Adams*, 9 Ia., 474.)

E. F. Gray and D. B. Carey, contra, cited: *Mathews v. Smith*, 13 Neb., 178; *Stevens v. Dillman*, 86 Ill., 233.

IRVINE, C.

The plaintiff in error brought this action in the district court of Douglas county against George W. E. Dorsey, Hamilton H. Dorsey, and Jesse M. Marsh, individually and as partners doing business under the firm name of Dorsey Bros. & Co., to recover on a promissory note for \$8,000. Attachments were issued directed to the sheriffs of Douglas, Saunders, and Dodge counties. Subsequently to the commencement of the action an affidavit for garnishment in the following form was filed:

"The affiant, Harry C. Bostwick, having been first duly sworn, deposes and says that he is the cashier of the plaintiff bank herein and its duly authorized agent; that he has good reason to and does believe that the Farmers & Merchants National Bank of Fremont, Nebraska, in the county of Dodge, has property of the defendants George W. E. Dorsey and Hamilton H. Dorsey, and of the defendants Dorsey Bros. & Co., in its possession or under its control; that this affiant is unable to specifically describe said property further than to say that it is money, choses in action, promissory notes, stocks, bonds, and other evidences of debt.

"And affiant further says that said Farmers & Merchants National Bank of Fremont, Nebraska, is indebted to said defendants George W. E. Dorsey and Hamilton H.

Dorsey, and each of them, and to the said defendants Dorsey Bros. & Co., in an amount unknown to this affiant."

On this affidavit an order of garnishment in the usual form was issued, directed to the sheriff of Dodge county, and a notice of garnishment served on the Farmers & Merchants National Bank, directing it to appear in the district court of Douglas county, on a day named in the writ and answer. Instead of answering, the bank appeared by the following motion: "The Farmers & Merchants National Bank of Fremont, Nebraska, moves the court to quash the notice of garnishment served upon Otto Huette, its president, by the sheriff of Dodge county, Nebraska, requiring him and it to appear in this said district court of Douglas county, to answer touching property and credits of said defendants, upon an order of attachment herein, and the sheriff's return to the service of said notice, because said notice and service are void, and without the authority of the law, and because said Farmers & Merchants National Bank and its said president reside and are within Dodge county and do not reside and are not within Douglas county, where this action is brought, and because it and its president ought not to be required to answer in garnishment in any other county than that of their residence. This motion is supported by affidavit." This motion was sustained, and the garnishee discharged; from the order thus made the plaintiff prosecutes error.

Two questions are presented by these proceedings. The first is whether the motion filed by the garnishee constituted a general appearance and waived jurisdictional defects; second, whether, if the appearance of the garnishee did not waive defects, an order of garnishment can be issued to a county other than that in which the action against the debtor is pending?

We do not think that the motion filed by the garnishee constituted a general appearance or estopped it from urging that it was not properly brought before the court. The

argument is, that the motion is too broad; that it does not purport to be a special appearance, and that by stating that the garnishee does not reside in Douglas county, it presents an issue not necessary to the question of jurisdiction. On the latter point it is sufficient to say that the pleader was merely stating the grounds upon which his motion was based; that by injecting the element of residence he was not calling upon the court for any affirmative action. The motion alleged that the garnishment was invalid; first, because the bank did not reside in Douglas county, and second, because it was not within Douglas county. If the bank gave one good reason for holding the garnishment invalid, the fact that it gave another reason which might not be good, and which was unnecessary, would not affect the merits of the motion; nor do we think that the appearance was made general by the failure to designate it as special. At the common law, pleadings had formal parts, and were determined rather according to their form than their substance. By the Code, formal pleadings do not exist, and the substance alone is looked to; therefore, if this motion was, in its substance, a special appearance, the plaintiff's contention must fail. An examination discloses that the object of the motion was merely to quash the notice of garnishment. It went solely to the question of jurisdiction, and did not invoke the power of the court on any question except that of jurisdiction. This, we think, is what distinguishes a special from a general appearance. In *Porter v. Chicago & N. W. R. Co.*, 1 Neb., 14, it was said by MASON, C. J., that a defendant may appear specially to object to the jurisdiction of the court, but if he seeks to bring its powers into action excepting on a question of jurisdiction, he will be deemed to appear generally. The same language was issued by LAKE, C. J., in *Crowell v. Galloway*, 3 Neb., 215. The same principle was applied in *Aultman v. Steinan*, 8 Neb., 109, and an appearance held general, because a motion was made to dismiss the case for reasons

held not to affect the jurisdiction of the court. This was also the ruling of the court in *Cropsey v. Wiggenhorn*, 3 Neb., 108, and in *Bucklin v. Strickler*, 32 Neb., 602. See, also, on this question a review of the cases in *Hurlburt v. Palmer*, 39 Neb., 158. The reason and the doctrine of all the cases is that an appearance is special when it is confined to an attack upon the jurisdiction, but that it becomes a general appearance whenever the power of the court is invoked on any other question.

We now come to the merits of the motion. It is familiar law that process of attachment and garnishment is solely the creature of statute. While the statutes on the subject are remedial in their character, and should consequently receive a liberal construction, still no powers can be exercised which are not within the terms of the statute expressly or by fair implication. Our Code (sec. 202) provides for issuing orders of attachment to different counties, and as a general proposition a garnishment, when founded upon a proper affidavit, may follow an attachment; but the garnishment depends upon the affidavit, and the requisites thereof appear in section 207 of the Code of Civil Procedure, which is as follows: "When the plaintiff, his agent or attorney, shall make oath, in writing, that he has good reason to and does believe that any person or corporation, to be named and within the county where the action is brought, has property of the defendant (describing the same) in his possession, if the officer cannot come at such property, he shall leave with such garnishee a copy of the order of attachment, with a written notice that he appear in court, at the return of the order of attachment, and answer, as provided in section 221." This section has existed without amendment since the adoption of the Code, November 1, 1858. It is contended on behalf of the plaintiff that the attachment and garnishment constitute a separate action, and that the requirement that the garnishee shall be within the county where the action is brought re-

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fers to the attachment and to the county where the writ is executed; but an inspection of the rest of the chapter relating to attachment, we think, makes it clear that the "action" referred to is the principal action on which the attachment is based. Thus, section 198, the first of the chapter, provides: "The plaintiff in a civil action for the recovery of money may, at or after the commencement thereof, have an attachment," etc. Section 199 provides: "An order of attachment shall be made by the clerk of the court, in which the action is brought," etc. Section 203: "The return day of the order of attachment, when issued at the commencement of the action, shall be the same as that of the summons." Section 226: "Final judgment shall not be rendered against the garnishee until the action against the defendant in attachment has been determined; and if in such action judgment be rendered for defendant in attachment, the garnishee shall be discharged and recover costs." And so on throughout the chapter, the word "action" being used, evidently, to distinguish the principal case from the attachment proceedings. If such be the true construction, then it is clear that the statute, in plain and unambiguous language, requires the affidavit to show that the garnishee is within the county where the principal action is brought, and it is not claimed that outside of section 207 there is any authority for issuing an order of garnishment to another county. But if the word "action" be held to refer to the attachment proceedings, still Douglas would be the county where such action was brought. The writ was issued from and was returnable to the district court of Douglas county. The action was brought in Douglas county, the writ was merely to be executed in Dodge county. It was no more brought in Dodge county than was the principal case, because a summons was issued and served in that county upon the defendants there residing. There exists in principle a reason for giving the statute the construction we have indicated. A garnishee is an innocent

party not interested in the suit. The whole policy of the law is to protect him from expense, damages, costs, or unnecessary annoyance. A defendant must be sued in the county where he resides, or is at the commencement of the action, except in special cases, where a departure from the general rule is necessary. A witness cannot be required in a civil case to leave the county where he resides, or is found, in response to a subpoena from another county. It seems to have been the intention of the legislature to put a garnishee on as favorable a footing as a defendant or a witness. It would certainly be a great hardship to compel a garnishee to travel over the state for the purpose of making answer. In support of plaintiff's contention, we are cited to the case of *Conohan v. Cullin*, 2 Dis. [O.], 1. In that case it was held that service of an order of garnishment in Cincinnati on an agent there of a corporation situated in Cleveland was bad, and in the opinion there is a *dictum* that to authorize service on the Cleveland company an order of attachment should be issued to Cuyahoga county. We do not know whether the Code, as it then existed in Ohio, was similar to ours in this respect. It is not now similar, and has not been for many years. It does not now require that the affidavit shall show that the garnishee is within the county, but provides especially for issuing orders of garnishment to other counties, and for the taking of the answers of the garnishees in the counties to which the orders are issued. But if the Ohio Code was, at the date of this decision, similar to ours, we cannot think that we are bound by the construction given by an inferior Ohio court in an *obiter dictum*, the same year in which our Code was adopted.

From an examination, necessarily somewhat cursory, of the statutes of other states we find none embracing the language which is here the subject of investigation. Florida, Georgia, Ohio, and Texas provide specially for garnishments to other counties, and all provide that in such case an answer may be made without requiring the garnishee to

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leave the county. We are aware that the construction we are giving the statute seems to leave the law in such a shape that property and credits of a debtor residing in the state cannot be reached when they are in the hands of a third person in a county where action cannot be brought against the debtor, because it has been held that action may not be brought in a county where the garnishee resides, and summons issued to the county of the debtor's residence. (*Hoagland v. Wilcox*, 42 Neb., 138.) We do not think, however, that we can avoid this difficulty without a forced construction of the statutes. The legislature, and not the courts, must correct the defect.

JUDGMENT AFFIRMED.

CLEMMA CONGER V. B. F. DODD.

FILED MAY 1, 1895. No. 4675.

1. **Bill of Exceptions: DEFECTS: SUFFICIENCY OF EVIDENCE.**
If a bill of exceptions discloses that important evidence has been therefrom omitted authentication of the bill to the effect that it contains all the evidence will not control, and in such case the verdict will not be disturbed as contrary to the evidence.
2. **Review: DEFECTIVE TRANSCRIPT: INSTRUCTIONS.** Where error is assigned upon the giving of a certain instruction, on the ground that while abstractly correct, it is misleading for want of modifications, the court will not consider such assignment where it appears that the whole charge is not included in the transcript, because proper modifications may have been given in other instructions.

ERROR from the district court of Sherman county.
Tried below before CHURCH, J.

J. R. Scott, for plaintiff in error.

Nightingale Bros. and Wall & Bradley, contra.

IRVINE, C.

Dodd began this suit against Conger in replevin to recover certain chattels. Dodd claimed the property as owner. Defendant below, Mrs. Conger, had taken the property under a chattel mortgage purporting to be executed by Dodd to secure a promissory note for \$101.50 purporting to have been executed by Dodd July 11, 1887, and due August 11, 1887. Dodd had judgment in the district court from which Mrs. Conger prosecutes error.

The first assignment of error is that the verdict is not sustained by the evidence. Dodd undoubtedly made out a *prima facie* case of ownership. Mrs. Conger then introduced evidence tending to prove that her husband had procured her to loan Dodd \$100; that after the negotiations had been made, and the money advanced, Mr. and Mrs. Dodd and Mr. Conger met at Mr. Conger's house; that a note and mortgage were there produced by Conger, read over to the Dodds, and Dodd's signature affixed to both by Mrs. Dodd, Dodd expressly authorizing her and directing her so to do. Dodd, in rebuttal, offered evidence tending to show that when this occurred he was so intoxicated as not to understand what he was doing; that he had been negotiating with Conger for the sale to Conger of his farm; that Conger paid him \$100 in cash, taking this note, and agreeing on the maturity of the note to pay him \$200 more. Dodd claims that he did not know that he signed or directed to be signed any mortgage, and Mrs. Dodd claims that she was informed the instrument she signed was an agreement for the sale of the farm. It appears quite clearly that Dodd knew of the mortgage not long after its maturity, which was long before the bringing of this action. The evidence is extremely vague and far from convincing. We would have great doubt whether what appears in the bill of exceptions would be sufficient in itself to sustain the verdict; but the bill of exceptions discloses that three

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documents were introduced in evidence: one was the mortgage, one was the note, the third was offered in this language: "Counsel for defendant here offered in evidence an instrument signed by B. F. Dodd, and marked 'Exhibit B'." A careful search of the record discloses no evidence tending to show what this instrument was, and no copy of the instrument appears in the bill. In the examination of the witnesses, with reference to the alleged sale of the land, and the transactions at the time the note and mortgage were executed, much reference is made to this Exhibit B. This document may have been of such a character as to have supplemented the proof in regard to the alleged contract of sale and the fraud alleged to have been practiced upon Dodd and his wife. The certificate that the bill of exceptions contained all the evidence does not prevail against the intrinsic evidence afforded by the bill itself that there was an important omission, and in such case the verdict will not be disturbed as contrary to the evidence. (*Missouri P. R. Co. v. Hays*, 15 Neb., 224; *Oberfelder v. Kavanaugh*, 29 Neb., 427; *Dawson v. Williams*, 37 Neb., 1.)

Several assignments of error relate to the exclusion or admission of evidence, but these assignments, with perhaps one exception, are too indefinite to point out the ruling complained of, and must, therefore, be disregarded. In the one instance referred to the error assigned was in excluding testimony. No offer was made to show what it was sought to prove, and the question itself does not show the materiality of the inquiry.

It is assigned as error that the court erred in giving instruction No. 4. Counsel do not argue that this instruction misstated the law, but they contend that it was misleading when not accompanied by any modifying instructions. Instruction No. 4 is, however, the only instruction included in the transcript, and the certificate of the clerk is that the transcript is a true and perfect one "of petition, answer,

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and instruction No. 4, given by the court." The inference, both from this certificate and from the number of the instruction, is that other instructions were given. Error will not be presumed; and when objection to an instruction is made on the ground stated, we cannot determine that there was error without having the whole charge before us.

Finally, it is assigned that the court erred in overruling the motion for a new trial, but as the motion referred to states eight grounds for a new trial, this assignment is too indefinite to present a case for review.

JUDGMENT AFFIRMED.

STATE OF NEBRASKA, EX REL. LION INSURANCE COMPANY, ET AL. V. ELIAS BAKER, CLERK OF THE DISTRICT COURT.

FILED MAY 2, 1895. No. 7651.

1. **Supersedeas Bonds: SURETIES: APPROVAL.** The only qualifications prescribed by the Civil Code for sureties on undertakings therein authorized are those mentioned in section 898, viz., that such sureties must be residents of this state, worth double the sum to be secured beyond the amount of their debts, and have property liable to execution in this state equal to the sum to be secured.
2. —: **SURETIES IN DIFFERENT COUNTIES: APPROVAL.** A supersedeas undertaking executed by several sureties, but one of whom resides in the county in which such undertaking is required, the others being residents of a different county in this state, should not be rejected on the ground that the resident surety lacks the necessary property qualifications, provided his co-sureties possess all of the qualifications prescribed by law, and the undertaking in other respects satisfies the requirements of the statute.
3. **Final Order: RULING ON MOTION TO REQUIRE APPROVAL OF SUPERSEDEAS BOND: MANDAMUS.** The decision of the district

court, refusing to require the approval by the clerk thereof of a particular undertaking for a stay of execution pending proceedings by petition in error, is "an order affecting a substantial right in a summary proceeding after judgment," and, therefore, a final order which may be reviewed in this court upon petition in error.

ORIGINAL application for *mandamus* to compel the respondent to approve a supersedeas bond. *Writ denied.*

Jacob Fawcett, for relator.

Charles O. Whedon, *contra.*

POST, J.

This is an application for a writ of *mandamus* and presents the following essential facts: On the 29th day of December, 1894, the Buckstaff Bros. Manufacturing Company, a corporation, recovered a judgment against the relator in the district court of Lancaster county on a policy of insurance. On the 25th day of February, 1895, said judgment having been removed into this court for review by means of a petition in error, the relator tendered to the respondent, as clerk of the district court for said county, a supersedeas undertaking and requested the latter to examine and approve the same if found satisfactory. The respondent, while admitting that it is in due form, declines to approve it on the ground that but one of the three sureties thereon is a resident of Lancaster county, and that he is not possessed of the property qualifications prescribed by law.

It is conceded by the relator that the resident surety is not worth double the amount named in the bond over and above the amount of his debts, and is not possessed of property in this state liable to execution equal to the amount sought to be secured. It is claimed, however, and not denied, that the other sureties, who all reside in Douglas county in this state, possess the necessary qualifications.

The respondent has not only waived the issuing and service of the alternative writ, but has appeared in person and joins in requesting a construction of the provisions of the Code prescribing the qualifications of sureties in like cases. We might under ordinary circumstances decline to consider the question above suggested, since the writ must be denied on other grounds; but in view of the evident desire of the respondent to discharge his duty in a position shown to be peculiarly embarrassing, and the further fact that a decision of the question will probably prevent a second proceeding having for its object the relief herein sought, we have concluded to examine the provisions of the statute bearing upon the subject.

Section 898 of the Civil Code reads as follows: "The surety in every undertaking provided for by this Code, must be a resident of this state, and worth double the sum to be secured beyond the amount of his debts, and have property liable to execution in this state equal to the sum to be secured. Where there are two or more sureties in the same undertaking, they must in the aggregate have the qualifications prescribed in this section." The provision under which the stay is sought in this instance is section 588 of the Code, and which, so far as material to our inquiry, is as follows: "No proceeding to reverse, vacate, or modify any judgment or final order rendered in the probate court, or district court, except as provided for in the next section, * * * shall operate to stay execution, unless the clerk of the court in which the record of said judgment or final order shall be, shall take a written undertaking, to be executed on the part of the plaintiff in error to the adverse party, with one or more sufficient sureties, as follows," etc. Among the many undertakings authorized by the Code we discover four special provisions only, which will control the general one above quoted, viz., section 206, for a delivery bond in favor of the sheriff holding an execution; section 219, for the discharge of an at-

tachment on the execution of a bond by the defendant or other person in his behalf; section 919, for an undertaking by the plaintiff to secure an order of arrest in a civil action before a justice of the peace; section 949, for the discharge of an attachment issued by a justice of the peace upon the execution of an undertaking, etc. There are, on the other hand, many special provisions which harmonize with the general rule of the statute, but one of which need be here cited, viz., section 234, authorizing the discharge of an attachment at any time before judgment whenever made to appear to the court that the surety on the plaintiff's undertaking is not sufficient or has removed from the state.

Residence is, as a rule, one of the qualifications prescribed for the sureties on the official bonds of county and municipal officers; but we find no authority for extending that rule to undertakings under the Code, especially in view of the express provision therein to which reference has been made. The law has conferred upon the respondent, as clerk of the district court, a discretion in determining the sufficiency of undertakings to be approved by him, and that discretion will not be controlled by the writ of *mandamus*. (*State v. Kendall*, 15 Neb., 262.) But in the case before us the respondent justifies his refusal on the sole ground that the surety residing in Lancaster county is insufficient, without regard to the qualifications of those residing in Douglas county. Assuming, therefore, what is not decided, viz., that the petition states a cause for the relief sought, it is probable that the relator would have been entitled to judgment on the pleadings but for an allegation of the answer which is confessed by the demurrer. It is therein alleged that the relator heretofore, by motion, applied to the district court for a rule upon the respondent requiring him to show cause why he should not be required to approve the identical bond mentioned in the pleadings in this cause; that he thereafter appeared in obedience to an order of the court and was examined on oath touching his reasons for

such refusal, and an order was by the court therein entered fully justifying his action in the premises and discharging him from further responsibility in the matter, which order has never been reversed or modified. The following is the record of said order, omitting caption: "This cause now comes on to be heard on the motion of the defendant for an order directing the clerk of this court to approve the supersedeas bond tendered in this case, and, after hearing the oral evidence of the clerk of this court, the said clerk is hereby discharged from further responsibility in the matter, and upon due consideration whereof and of the statutes of this state relating to supersedeas bonds, the court holds that the law requires at least one of the sureties on a supersedeas bond to be a resident of the county where the judgment is rendered and to be financially responsible in the amount by law required. Whereupon it is by the court ordered that said motion be, and the same is hereby, overruled, to which the said defendant duly excepted." A final order which may be vacated, modified, or reversed upon proceedings in error is one "affecting a substantial right in an action, when such order in effect determines the action and prevents a judgment, and an order affecting a substantial right made in a special proceeding, or upon a summary application in an action after judgment." (Code, sec. 581.) That the above order is one affecting a summary proceeding after judgment, within the meaning of the Code, cannot be doubted; and that the subject thereof is within the jurisdiction of the district court, as an incident to its power to control its process in the enforcement of its judgments and decrees, is a proposition not controverted by the relator. Although a future consideration of that question on its merits may lead to a different result, we are for the purpose of this proceeding willing to adopt a conclusion satisfactory to both the relator and the respondent. The question whether the remedy by motion, as in this instance, is exclusive or concurrent merely, is not presented and is

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not decided. It follows, however, from what has been said that the remedy pursued was an appropriate one, and the decision of the court as embodied in the final order cannot be disregarded or assailed in a collateral proceeding. The writ will, therefore, be denied, and like orders will be made on the application of the other relators, fourteen in number.

WRIT DENIED.

HARRIET WRIGHT V. STATE OF NEBRASKA.

FILED MAY 2, 1895. No. 7339.

1. **Criminal Law: REVIEW: RECORD.** All presumptions exist in favor of the regularity of the judgments of courts of general jurisdiction, and he who asserts the contrary is required to establish the alleged error by an exhibition of the record.
2. ———: ———: ———. An objection on the ground that a particular charge of an information was not included in the complaint upon which an accused was held to answer by the examining magistrate, will not be noticed by this court on petition in error to review a judgment of conviction where such preliminary complaint is not set out or made a part of the record.
3. **Disorderly Houses: EVIDENCE.** Evidence examined, and held to sustain a conviction under section 210, Criminal Code, for the knowingly owning, using, and occupying of a house in this state for the purpose of prostitution.
4. **Criminal Law: BILL OF EXCEPTIONS: AFFIDAVITS.** Where affidavits are used as evidence on the trial of any issue of fact, they must, to be available for the purpose of review by petition in error in this court, be identified and preserved in the form of a bill of exceptions.
5. ———: **SENTENCE: REVIEW.** To the district court and not to this has been entrusted the power to impose sentences for the commission of offenses against the laws of the state, and the judgments of that court will not be interfered with on the ground that they are excessive in the absence of a clear abuse of discretion.

ERROR to the district court for Platte county. Tried below before SULLIVAN, J.

C. A. Woosley and W. M. Cornelius, for plaintiff in error.

A. S. Churchill, Attorney General, and W. S. Summers, Deputy Attorney General, for the state.

POST, J.

It is by this proceeding sought to reverse a judgment of the district court for Platte county, whereby the plaintiff in error, Harriet Wright, was adjudged guilty of a violation of section 210 of the Criminal Code. The information upon which the accused was convicted charges the knowingly owning, using, and occupying by her of a certain house or building in said county for the purpose of prostitution. The provisions of the section above mentioned, so far as material to the questions presented by the record, are as follows: "Every house or building situated in this state, used and occupied as a house of ill-fame, or for the purposes of prostitution, shall be held and deemed a public nuisance, and any person owning, or having control of, as guardian, lessee, or otherwise, such house or building, and knowingly leasing or subletting the same in whole or in part for the purpose of keeping therein a house of ill-fame, knowingly, or permit the same to be used or occupied for such purpose, or using or occupying the same for such purpose, shall for every such offense be fined in any sum not exceeding \$100, or imprisoned not less than thirty days nor more than six months, or both, at the discretion of the court."

The first assignment of the petition in error is that the trial court erred in refusing to quash the information on the ground that the accused had not been allowed a preliminary hearing upon the particular offense charged in the information. It is conceded by counsel that a complaint of some kind was lodged with a magistrate and that an exami-

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nation of the accused was had on the charge therein stated; and said information not being included in the record before us, it cannot be determined that the district court erred in the ruling assigned. The rule is too firmly established to require the citation of authorities, that all presumptions exist in favor of the judgments of courts of general jurisdiction, and that he who asserts the contrary is required to establish the alleged error by an exhibition of the record. The principal contention of the accused relates to the sufficiency of the evidence to sustain the judgment. The character of the premises in question as a house of prostitution, and the former proprietorship of the accused, are facts clearly established by the proofs, and not seriously controverted on this hearing. It is, however, contended that she was not during the period named in the information either the owner or proprietor of said house, or in anywise related to the management or control thereof. It is shown by the record that the accused, on the 24th day of May, 1893, by written undertaking agreed to sell and convey said property to Mrs. L. M. Gaffney upon the payment by the latter of \$2,500 on or before the 10th day of February, 1894, and on the day last named said property was conveyed by her to said Gaffney by warranty deed, with the usual covenants. There is evidence also tending to prove that Mrs. Gaffney, in the month of September, 1893, sold and assigned her interest in the property under and by virtue of said contract to one Edna De Vore, who it is claimed was the proprietress of the house at the time in question, and that the position of the accused therein was that of a servant only. On the part of the state it is contended that the contracts above mentioned, as well as the alleged proprietorship of Miss De Vore, are mere devices resorted to by the accused in order to evade responsibility for the traffic in which she was engaged. That question was submitted to the jury, assisted by a charge to which no exception was taken, and which is conceded to be an admirable exposition of the law of

the subject; and with the verdict rendered we discover no ground for interference in the proceeding. Aside from admissions proved which tend to establish the allegations of the information, it appears that there were during the period stated, in addition to the accused, five or six inmates of said house, all of whom, including Edna De Vore, the alleged proprietress, were prostitutes. The groceries and provisions for use in said establishment were ordered by the accused, and when not paid for by her as purchased, were sold and delivered on her credit. She also ordered beer by the case for use on the premises, and personally paid fines assessed against the inmates of said house who had been convicted under the ordinances of the city of Columbus on the charge of being inmates of a house of ill-fame. The evidence explanatory of the foregoing facts is, it must be conceded, consistent with the theory of her innocence, but the credibility of such evidence was purely a question of fact; and the verdict of guilty having received the approval of the judge who presided at the trial, must, on the record presented, be deemed conclusive. The case of *Drake v. State*, 14 Neb., 536, relied upon by the plaintiff in error, merely states the rule that to warrant a conviction in such a case the prisoner must have owned or controlled the house, and knowingly permitted it to be used for the purpose of prostitution, and is therefore in harmony with the conclusions here stated.

The next assignment is that the trial court erred in refusing to set aside the verdict on the ground of misconduct of the jury. From the transcript it appears that the question of the alleged misconduct was submitted to the court upon affidavits, and by that court resolved in favor of the state; but that ruling cannot be examined in this proceeding, for the reason that said affidavits are not incorporated in a bill of exceptions. It is the settled rule of this court that affidavits used on the trial of issues of fact must be preserved in the form of a bill of exceptions in order to be

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available to the complaining party on appeal or petition in error. (*Vindquest v. Perky*, 16 Neb., 284; *Fitzgerald v. Benardom*, 35 Neb., 317; *Maggard v. Van Duyn*, 36 Neb., 862.)

Finally, it is urged that the sentence (imprisonment for a term of three months in the county jail) is excessive; but to the district court and not to this court is entrusted the power to impose sentences for the commission of crimes against the state; and the judgments of that court cannot be controlled or interfered with in the absence of a clear abuse of discretion. (*Davis v. State*, 34 Neb., 558.) The minimum penalty for the offense charged is, as we have seen, a fine not exceeding \$100, or imprisonment for not less than thirty days, while the maximum penalty is both the fine named and imprisonment for a period not exceeding six months. The judgment, being far short of the extreme penalty prescribed by law, cannot be regarded as an abuse of discretion authorizing a reversal on that ground. There being no error apparent from the record, the judgment will be

AFFIRMED.

GEORGE H. EASTMAN, APPELLEE, V. ORIN R. CAIN ET
AL., APPELLANTS.

FILED MAY 2, 1895. NO. 7335.

1. **Appointment of Receivers: FORUM OF JURISDICTION: APPEAL.** The district courts and judges are vested with jurisdiction by statute to hear and determine applications for the appointment of receivers in cases then pending in such courts, and also after appeal on the merits to this court.
2. ———: ———: ———. * The district courts and judges being clothed with such jurisdiction, it is consonant with the better practice to present such applications to them, and, except in cases where sufficient reasons exist therefor, this court will not entertain and determine original applications for the appointment of receivers.

APPLICATION of E. Charles Francis, intervenor, for appointment of a receiver to control mortgaged property pending appeal from a decree of foreclosure rendered by the district court of Douglas county. *Application overruled.*

F. B. Tiffany, for intervenor.

E. C. Wolcott, for appellants.

E. R. Duffie, for appellee.

HARRISON, J.

In an action to foreclose a real estate mortgage, commenced in the district court of Douglas county, such proceedings were had as resulted in a sale by a master commissioner, a confirmation of the sale and deed to the purchaser. After such sale a motion was filed to make Ethan C. Wolcott a party defendant to the action, which was sustained, and it appears that summons was duly issued and service of it made upon Wolcott, who entered a special appearance and filed objections to the jurisdiction of the court, which, upon hearing, were overruled, and Wolcott having elected to not further appear or plead, a decree of foreclosure was entered as to his rights in the premises, from which he appealed to this court, and the purchaser of the property at the sale made under the decree of foreclosure makes this his application for the appointment of a receiver to take charge of the property during the pendency of this appeal and to collect the rents, issues, and profits thereof and apply the same to the payment of the taxes assessed against the property, in necessary repairs thereon, and in payment of the interest accruing or accrued upon a mortgage indebtedness existing against it, which was a lien upon it prior to and at the time of the foreclosure suit and sale, and superior to the mortgage foreclosed, stating further that Wolcott is in possession and control of the

premises and collecting the rents, etc., and containing such other allegations as the pleader deemed proper to show the necessity for the appointment of a receiver, but which we need not here give further notice, as in the disposition now contemplated of the application its merits will not be in question, and no statement or knowledge of its grounds will be essential.

Section 266 of the Code of Civil Procedure relative to the appointment of receivers is as follows: "A receiver may be appointed by the supreme court or the district court, or by the judge of either, in the following cases: First—In an action by a vendor to vacate a fraudulent purchase of property, or by a creditor to subject any property or fund to his claim, or between partners or others jointly owning or interested in any property or fund, on the application of any party to the suit, when the property or fund is in danger of being lost, removed, or materially injured. Second—In an action for the foreclosure of a mortgage, when the mortgaged property is in danger of being lost, removed, or materially injured, or is probably insufficient to discharge the mortgage debt. Third—After judgment, or decree to carry the same into execution, or to dispose of the property according to the decree or judgment, or to preserve it during the pendency of an appeal. Fourth—In all cases provided for by special statutes. Fifth—In all other cases where receivers have heretofore been appointed by the usages of courts of equity." And in section 271 it is provided, in reference to a hearing upon such an application, as follows: "Any party to the suit may, upon the hearing of the application, show, by affidavit or otherwise, objections to the proposed sureties and to the proposed receiver, and what is the value of the property to be taken possession of, and that a receiver ought not to be appointed. He may also nominate a person to be receiver, giving at the same time the names of his proposed sureties. No person shall be appointed receiver who is party, so-

licitor, counsel, or in any manner interested in the suit." It will be noticed that the district courts and the judges thereof are, by the first section of the Code hereinbefore quoted, given jurisdiction, and by the other sections the right is accorded the party against whom the application is directed to litigate issues in relation to the value of the property and other matters alleged in the petition as the basis for the prayer for the appointment of the receiver, and to show the facts, as to such points, "by affidavits or otherwise." The district courts or judges being clothed with jurisdiction to hear and determine applications for receivers, and a trial as to the facts by affidavits or otherwise being granted as a part of the proceedings, it seems to us that in the absence of any special facts or reasons for the presentation of the application to this court originally, it would probably be less expensive to litigants and more convenient in all respects, and the ends of justice be as well subserved, if such applications be made to district courts or the judges in the districts or counties where the actions were instituted. The district courts or judges are given the authority by law to take the testimony and to hear and determine as to all questions pertaining to the relief sought, and grant and enforce the prayer of the petition, or have full power and jurisdiction of the subject in all respects; and this court is an appellate court, one established, in the main, for the hearing of causes brought to it by error proceedings or appeal. It seems to us but meet and proper that applications of this nature should, so far as practicable, and where, as we have before stated, no particular reasons are disclosed for their commencement originally in this court, be presented to and disposed of by the power which seems most convenient and proper for their adjudication, the district courts and judges, and such actions in this court be discouraged or not entertained. That the district courts and judges are by our statute clothed with jurisdiction of such applications during the pendency of the

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actions in which made, in the district court, and also after an appeal has been taken on the merits of the case, we have no doubt, and we deem it better practice that it should be made to them. (Beach, Receivers, secs. 11, 114.)

In the case of *Fitzgerald v. Fitzgerald & Mallory Construction Co.*, 44 Neb., 463, this court very recently entertained an application for the appointment of a receiver and, on hearing, made such appointment. The reason which moved us to retain the matter in this court and appoint a receiver and not remand it to the district court, will be understood by reading the following statement quoted from that opinion: "In the plaintiff's amended bill he prays for a receiver to wind up the business of the Construction Company and to distribute its property among the stockholders thereof, after paying and satisfying all of its just debts. And a supplemental application has been addressed to us for the appointment of a receiver here instead of remanding the cause for final action by the district court. We should, in view of our settled practice, feel constrained to dismiss the application summarily, but realizing that we are not without blame for the long delay in this court, to the prejudice of all parties concerned, we have decided to retain the cause for such further action as may hereafter be deemed appropriate. The usual and orderly course of procedure would be through the agency of a receiver. * * * No sufficient reason having been suggested for denying the application, a receiver will be appointed with authority to collect the amount here adjudged against the defendant company and to disburse the same under the directions of the court."

It follows from what has been hereinbefore expressed that the present application will be denied without prejudice to a new application, there having been no consideration or adjudication in regard to its merits.

JUDGMENT ACCORDINGLY.

FRITZ JOHANNSON V. LORENZO E. MILLER.

FILED MAY 2, 1895. No. 6157.

1. **Replevin: EVIDENCE.** In replevin the right of possession must be affirmatively shown to exist in favor of the plaintiff, and plaintiff's right to recover cannot be predicated upon the mere failure of the defendant affirmatively to establish in his own favor a superior right in that respect.
2. ———: ———. Where the rights of plaintiff in an action of replevin owe their existence to certain written leases to parties from whom plaintiff claims to have derived his superior right of possession in the property replevied, the failure to offer in evidence either such original leases, or copies thereof when admissible, will operate to defeat plaintiff's action.

ERROR from the district court of Sherman county. Tried below before HOLCOMB, J.

Nightingale Bros., for plaintiff in error.

Aaron Wall, *contra*.

RYAN, C.

This action of replevin was brought by the plaintiff in error for the possession of twenty tons of hay contained in three stacks which stood on premises owned by the defendant. In his petition plaintiff described the hay as having grown on section 36, township 16, range 14, a school-land section in Sherman county. On the usual issue in an action of this nature, there was a trial to a jury, which returned a verdict in favor of the defendant, upon which judgment was duly rendered.

The plaintiff claimed that he had the exclusive right to cut the grass on section 36 aforesaid, in 1890, under an oral lease with Johnson T. Hale, who, he alleged, had the right to make such lease by reason of authority to that effect

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conferred upon him by R. H. Maxwell, the alleged holder of the lease of said school section made to him by the owner, the state of Nebraska. The defendant, though he attempted it, showed no valid right to enter upon said section for the purpose of making hay. He cut the grass thereon, and, when it was cured, removed it with no better claim of right than that the land was uninclosed and that the grass growing thereon could lawfully be converted into hay and removed by any one who took that trouble. As against any person owning or lawfully holding under the owner, this assumption was without question unwarranted, and yet, for the hay so removed, no mere stranger could maintain replevin. The instructions fairly embodied this proposition, and if the jury under such instructions, justified by the evidence, found correctly, there exists no reason for considering any other question presented in this court.

The only testimony tending to show a lease to R. H. Maxwell of this school section was given by himself. He said: "I held and owned a school land lease upon it in 1890—No. 35,445, No. 32,737. Maxwell, Sharpe & Ross Co., of Lincoln, Nebraska, now own my interest in it." Upon request to make the lease referred to, and which he said was in his possession, a part of his deposition, Mr. Maxwell said: "The present owners refuse said lease to be used for this purpose." There was no further attempt to introduce in evidence either the original or a copy of this lease. In reference to the rights of Hale with respect to the school section in 1890 the testimony, also by deposition of Mr. Maxwell, was, that he made a grass lease of it for that year to Mr. Hale; that he in writing appointed as his agent in Sherman county, Johnson T. Hale, whose residence was in Loup City, to look after and attend to said school lease land in 1890. This witness, when asked as to the authority which he conferred upon Hale, said that it was by a writing which would show for itself, and that he would send a certified copy of it, if necessary. There was intro-

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duced in evidence neither the original nor a copy of the instrument just mentioned. The asserted right of plaintiff to the exclusive possession of the aforesaid section 36 was therefore not shown by competent evidence, for there was no proper proof of the existence and terms of the alleged school lease under which Maxwell claimed, neither was there primary, nor admissible secondary evidence of the contents of the written contract made by Maxwell with Johnson T. Hale, from which Hale derived his right to control said section. The judgment of the district court is

AFFIRMED.

WILLIAM H. MITCHELL V. B. F. JONES.

FILED MAY 2, 1895. No. 5450.

1. **Physician: EVIDENCE OF EMPLOYMENT: REVIEW.** Where the sole question contested was whether or not plaintiff in error had employed the defendant in error as a physician to render needed services for the daughter of plaintiff in error, who was at the time over eighteen years of age, the verdict of the jury upon conflicting evidence will not be disturbed on error proceedings in this court.

ERROR from the district court of Buffalo county. Tried below before HAMER, J.

Frank E. Beeman, for plaintiff in error.

Greene & Hosteller, contra.

RYAN, C.

The defendant in error recovered against the plaintiff in error a judgment for the sum of \$5 in the district court of Buffalo county for services as a physician rendered at the

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instance of the plaintiff in error for his daughter. The defense was that this daughter, when the alleged services were rendered, was over eighteen years of age and was supporting herself and was alone responsible for medical services rendered on her behalf. There was also pleaded in the answer a counter-claim in the sum of \$20, being the amount due for the use of a horse, carriage, and driver furnished the defendant in error, for which it was alleged he had agreed to pay. There was a reply in denial of all the averments of the answer. There was sufficient evidence to sustain a much larger recovery than was had. Indeed, the verdict could properly have been as small as it was, only upon the theory that there was something allowed by reason of the counter-claim pleaded in the answer.

The daughter of the plaintiff in error, at the time the services were rendered in her behalf, was sick at the house of her father, distant about eighteen miles from Kearney. It seems from the evidence of Mr. Mitchell, the plaintiff in error, that he was in Kearney when he learned that his daughter required the services of a physician. He testified, at any rate, that upon receiving information of the condition of his daughter, he went out to hunt a physician for her; that he went to Mr. Wells to get a team to take a physician out with him, and by Mr. Wells was referred to Dr. Jones, the defendant in error; that Mr. Mitchell said that he did not know Dr. Jones, and Mr. Wells answered that he would go over to Mr. Baker's to telephone and see if Dr. Jones would go. Mr. Mitchell assented to this, as he testified, simply by going with Mr. Wells to the telephone suggested. At the telephone Mr. Wells told Mr. Mitchell that Dr. Jones would go. Mr. Wells sent a driver with the team he furnished and thereby Mr. Mitchell and Dr. Jones together were taken to the place where the doctor had been by Mr. Wells requested to go. Mr. Mitchell testified that nothing was said by him to Dr.

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Jones about the employment of the latter, and that he himself expected his daughter to pay the bill of the physician. There were, however, two witnesses who testified that they had heard Mr. Mitchell admit, on another occasion while being examined as a witness, that he himself employed Dr. Jones to render the services which, for his daughter, were rendered. The counter-claim pleaded in the answer was for the hire of the team and driver with which Dr. Jones and Mr. Mitchell made the above described trip. This bill Mr. Mitchell claimed in his testimony, he had incurred, and the amount of it, he had paid to Mr. Wells. If Mr. Mitchell really believed that his daughter should pay the expenses incident to receiving medical assistance, it would seem that he would have required her and not the doctor to reimburse him to the amount of this outlay. There was sufficient evidence as to the value of the services rendered, and in all other respects to sustain the verdict, and it is unnecessary to state it at all in detail. There has, however, been given such a summary of the proofs adduced as seems to justify the court in saying by its instruction to the jury that "if defendant so conducted himself that the plaintiff had reason to believe that the defendant purposed to pay for his services, you will allow him what they are reasonably worth." The judgment of the district court is

AFFIRMED.

UNION PACIFIC RAILWAY COMPANY V. G. H. D. JOHNSON ET AL.

FILED MAY 2, 1895. No. 6141.

1. **Carriers: BILLS OF LADING: INDORSEMENT: EFFECT.** Bills of lading are symbols of property, and when properly indorsed operate as a delivery of the property itself, investing the indorsees

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with a constructive custody which serves all the purposes of an actual possession, and so continues until there is a valid and complete delivery of the property, under and in pursuance of the bill of lading, to the person entitled to receive the same. *Pennsylvania R. Co. v. Stern*, 119 Pa. St., 24, and *Gates v. Chicago, B. & Q. R. Co.*, 42 Neb., 379, followed.

2. ———: ———: DELIVERY OF GOODS. The delivery of goods by a common carrier to the consignee thereof is made at the peril of the carrier, unless when made the consignee surrenders the bill of lading either made or indorsed to himself. *Gates v. Chicago, B. & Q. R. Co.*, 42 Neb., 379, followed.
3. ———: ———: ———: LIABILITY OF CARRIERS: TORTS. A railway company issued to shippers of grain in Nebraska several bills of lading as follows: "Received of ——— [the name of the shipper] the following described freight * * * marked and consigned as noted below * * * to be transported to ———, and delivered at the railway depot on payment of freight charges together with such charges as have been advanced on the same. Consignee, Brown Bros. Grain Company. Destination, Milwaukee, Wis." The bills of lading contained the following notations: "Care Union Elevator, Council Bluffs, Iowa. Stop at Brown Bros. Elevator Company to clean. Transfer at Council Bluffs." The carrier transported the grain to Council Bluffs and there delivered it to the consignee named in the bills of lading without requiring their presentation or surrender. The consignee sold the grain to Bacon & Co., of Milwaukee, and drew on them for its value, with the bills of lading indorsed to them attached to the drafts. Bacon & Co. honored the drafts, presented the bills of lading to the carrier and demanded the grain, and as it was not delivered, sued the carrier for its value. Part of the grain was delivered by the carrier to the consignee named in the bills of lading before he indorsed and attached them to the drafts drawn on Bacon & Co. *Held*, (1) That the bills of lading were through contracts, under and by which the carrier agreed to transport the grain from the places where it received it to Milwaukee, and there deliver it to the party entitled thereto; (2) that the notations on the bills of lading meant nothing more than that the grain should go by way of Council Bluffs to be cleaned there, or transferred to other carriers through the instrumentality of the elevator located there; (3) that the carrier, by the bills of lading, contracted to transport this grain to Milwaukee, and there deliver it to the consignee named in the bills of lading, or, if they had been transferred, to the lawful holders of said bills of lading; (4) that Bacon & Co., by honor-

ing the drafts drawn against them by the consignee named in the bills of lading, became and were entitled to have said grain delivered to them at Milwaukee; (5) that the carrier, by delivering the grain to the consignee at a station intermediate the point of shipment and the point of destination and without the surrender of the bills of lading, was guilty of a misdelivery and conversion of said grain; (6) that so long as the bills of lading were outstanding they were representations by the carrier to the commercial world that it had in its possession and under its control and in transit to Milwaukee the grain for which the bills of lading called; (7) that the carrier by delivering the grain while in transit to the consignee named in the bills of lading without their surrender put it in the power of Brown Bros. Grain Company to defraud third parties by selling the grain and indorsing the bills of lading, and that the carrier was also liable for the grain, on the principle that where one of two innocent parties must suffer, he who by his conduct has enabled a wrong-doer to perpetrate a wrong must bear the loss rather than the party without fault.

ERROR from the district court of Douglas county. Tried below before KEYSOR, J.

John M. Thurston and W. R. Kelly, for plaintiff in error, cited: *Pullman Palace Car Co. v. Missouri P. R. Co.*, 115 U. S., 587.

John D. Howe and E. R. Duffie, contra, cited: *Hutchinson, Carriers*, secs. 130, 344; *Furman v. Union P. R. Co.*, 106 N. Y., 579; *Colgate v. Pennsylvania R. Co.*, 102 N. Y., 120; *Missouri P. R. Co. v. Young*, 25 Neb., 651; *Ladue v. Griffith*, 25 N. Y., 364; *St. Louis, K. C. & N. R. Co. v. Piper*, 13 Kan., 505; *Mercantile Mutual Ins. Co. v. Chase*, 1 E. D. Smith [N. Y.], 115; *Home Ins. Co. v. Western T. Co.*, 51 N. Y., 93; *Bulkley v. Naumkeag Steam Cotton Co.*, 24 How. [U. S.], 386; *Clafin v. Boston & L. R. Co.*, 7 Allen [Mass.], 341; *Devereaux v. Barclay*, 2 B. & Ald. [Eng.], 704; *Forbes v. Boston & L. R. Co.*, 133 Mass., 154; *Weyand v. Atchison, T. & S. F. R. Co.*, 75 Ia., 580.

RAGAN, C.

In the months of October and November, 1891, certain persons at certain points in the state of Nebraska delivered to the Union Pacific Railway Company (hereinafter called the "Railway Company") for transportation seven cars of grain. The Railway Company at the time of such delivery issued and delivered to said shippers bills of lading for the grain received by it. All said bills of lading were substantially as follows: "Received of —— [the name of the shipper] the following described freight * * * marked and consigned as noted below * * * to be transported to ——, and delivered at the railway depot on payment of freight charges, together with such charges as have been advanced on the same." Such bills of lading also contained the following directions and notations:

No. 1. "Consignee, Brown Bros. Grain Co. Destination, St. Louis, Mo." (Notation:) "Care Union Elevator, Council Bluffs, Iowa."

No. 2. "Consignee, Brown Bros. Grain Co. Destination, St. Louis, Mo." (Notation:) "Care Union Elevator Co., Council Bluffs."

No. 3. "Consignee, Order Brown Bros. Grain Co. Destination, Milwaukee, Wis." (Notation:) "Stop at Council Bluffs, Brown Bros. Elevator Co., to clean. Transfer at Council Bluffs."

No. 4. "Consignee, Order Brown Bros. Grain Co. Destination, Milwaukee, Wis." (Notation:) "Clean at Council Bluffs, Brown Bros. Elevator Co. Transfer at Council Bluffs."

No. 5. "Consignee, Order Brown Bros. Grain Co. Destination, St. Louis." (Notation:) "Care Union Elevator, Council Bluffs, Iowa."

No. 6. "Consignee, Order Brown Bros. Grain Co. Destination, St. Louis." (Notation:) "Care Union Elevator, Council Bluffs."

No. 7. "Consignee, Brown Bros. Destination, Milwaukee." (Notation:) "Care Union Elevator, Council Bluffs."

The grain consisted of oats, barley, and shelled corn. The parties designated as consignee on the bills of lading are sometimes denominated "Brown Bros." and sometimes "Brown Bros. Grain Co.," but Brown Bros. Grain Company was the party intended as the consignee on each bill of lading. The notation, "Union Elevator" and "Brown Bros. Elevator, Council Bluffs" had reference to an elevator located in that city at that time leased and operated by Brown Bros. Grain Company, the consignee of the grain. It appears from the evidence in the bill of exceptions that at the time these shipments were made there was an elevator located in the city of Council Bluffs, Iowa. This elevator was owned by a corporation known as the Union Elevator Company. A contract existed between the elevator company and some five or six railway companies whose roads entered Council Bluffs, that the elevator company, in handling grain which might come into its possession for cleaning or transfer, or both, would not discriminate either in favor of or against either one of the railway companies mentioned. The Union Pacific Railway Company was a party to this agreement. It further appears that Brown Bros. Grain Company, at the time of the shipments in controversy, was the lessee of this elevator, was in possession of it and operating it. Persons shipping grain from points in Nebraska over the Union Pacific Railway Company's road, and which grain was consigned to Milwaukee or St. Louis, or other eastern points, if they desired, could have said grain stopped at Council Bluffs and cleaned in this elevator; and if it was desired by the Railway Company that the car in which such shipment was made should not go further than Council Bluffs, then the grain would be transferred through this elevator to the cars of the road which was to haul it from there to its place of destination. The Railway Company did not deliver this grain or any

of it either at Milwaukee or St. Louis, but it transported the grain to Council Bluffs, and there made an unconditional delivery of it to Brown Bros. Grain Company, the party named as the consignee in each of the bills of lading, and made such delivery to such consignee without the consignee's surrendering to the carrier the bills of lading issued by it to the shipper. Brown Bros. Grain Company, it appears, sold this grain to E. P. Bacon & Co.; made drafts on them for the value of the grain, and attached to such drafts the bills of lading, each bill of lading being indorsed, "Deliver to the order of E. P. Bacon & Co. Brown Bros. Grain Company. By C. T. Brown, Pt." Bacon & Co., on presentation of the drafts, honored them, and then presented the bills of lading to the Railway Company and demanded the grain. In the meantime Brown Bros. Grain Company had failed, and neither they nor the Railway Company ever delivered the grain to Bacon & Co. At the time Brown Bros. Grain Company indorsed the bills of lading to Bacon & Co., and attached them to the drafts which they drew on them for the value of the grain, the greater part of the grain had already been delivered to them, only one car of the grain being in transit or undelivered to Brown Bros. Grain Company at the time they indorsed said bills of lading and drew said drafts. Bacon & Co. brought this suit against the Railway Company in the district court of Douglas county for the value of said grain. A jury was waived and the case was tried to the court, resulting in a finding and judgment in favor of Bacon & Co.; and to reverse this judgment the Railway Company has prosecuted to this court a petition in error.

1. The bills of lading issued by the Railway Company to the shippers of this grain were through contracts, under and by which the Railway Company agreed to transport this grain from the places where it received it to Milwaukee and St. Louis, and there deliver it to the party entitled thereto. The terms of the bills of lading fixing the ex-

press destination of this grain and the notations, when explained by the evidence, leave no room for doubt whatever that these bills of lading were through contracts. (*Angle v. Mississippi & M. R. R. Co.*, 9 Ia., 487; *Mulligan v. Illinois C. R. Co.*, 36 Ia., 181; *Ogdensburg & L. C. R. Co. v. Pratt*, 22 Wall. [U. S.], 123; *Beard v. St. Louis, A. & T. H. R. Co.*, 44 N. W. Rep. [Ia.], 803.) The notations on the bills of lading, "Care of the Union Elevator, Council Bluffs," "Stop at Council Bluffs to clean," "Transfer at Council Bluffs," meant and mean nothing more than that the grain should go by way of Council Bluffs; some of it should be cleaned there; and some of it should be transferred to other lines or into other cars at that place through the instrumentality of said elevator. Doubtless it was a contract on the part of the Railway Company that it would transport said grain to its place of destination by way of Council Bluffs; that it would stop some of the grain at the elevator for the purpose of having it cleaned; and that whatever transfer it might be under the necessity of or desirous of making to other carriers in order to complete the transit should be made at that point. But nothing in these bills of lading, including the notations made thereon in reference to the elevator at Council Bluffs, authorizes or will sustain a construction that by the bills of lading the Railway Company agreed to transport this freight only to Council Bluffs or to make delivery of it there.

2. In the case at bar the Railway Company, the carrier, delivered the freight to the consignee named in the bills of lading without such bills of lading having been first surrendered to it. We are not necessarily concerned with the question whether a carrier may with impunity deliver goods to the consignee named in the bill of lading at the place of destination mentioned in such bill of lading without its surrender, the carrier having no knowledge at the time that such bill of lading has been assigned or transferred. The precise question in this case is whether the Railway Com-

pany, having no knowledge that these bills of lading had been transferred to Bacon & Co., was justified in delivering the grain to the consignee named in the bill of lading at a point intermediate the place of shipment and the place of destination.

In *Gates v. Chicago, B. & Q. R. Co.*, 42 Neb., 379, it was held: "The bill of lading issued by a carrier to the owner or shipper is the symbol of ownership of the goods shipped, and though not negotiable is assignable." (See, also, *Furman v. Union P. R. Co.*, 106 N. Y., 579, 13 N. E. Rep., 587.)

In *Pennsylvania R. Co. v. Stern*, 119 Pa. St., 24, 35 Am. & Eng. R. Cases, 551, it was held: "Bills of lading are symbols of property, and when properly indorsed operate as a delivery of the property itself, investing the indorsers with a constructive custody which serves all the purposes of an actual possession, and so continues until there is a valid and complete delivery of the property, under and in pursuance of the bill of lading, and to the persons entitled to receive the same." (See, also, Hutchinson, Carriers, sec. 129; *Forbes v. Boston & L. R. Co.*, 133 Mass., 154; *The Thames*, 81 U. S., 98. See, also, *Walker v. Detroit, G. H. & M. R. Co.*, 9 Am. & Eng. R. Cases [Mich.], 251.) In this case a creditor of the consignee attempted to get possession of the property by garnishment proceedings against the carrier. The supreme court of Michigan, however, discharged the carrier from liability on the garnishment proceedings, and held: "Common carriers must recognize transfers of bills of lading and consignments of goods, and unless protected by proper vouchers cannot always assume to deal with consignments as actually and beneficially belonging to the consignee."

In *McEntee v. New Jersey Steamboat Co.*, 45 N. Y., 34, it was held: "Common carriers deliver property at their peril, and must take care that it is delivered to the right person, for if the delivery be to the wrong person,

either by an innocent person or through fraud of others, they will be responsible, and the wrongful delivery will be treated as a conversion."

In *Hutchinson, Carriers*, sec. 130, it is said: "The carrier takes the risk of a delivery to the person entitled to the goods by the bill of lading and its indorsements. * * * Too great caution cannot, therefore, be exercised in respect to the right of the person to whom the delivery is made. No obligation of the carrier is more rigorously enforced than that which requires delivery to the proper person, and the law will allow in fact of no excuse for a wrong delivery except the fault of the shipper himself." (See, also, *Hutchinson, Carriers*, secs. 340, 344.)

In *Pennsylvania R. Co. v. Stern*, 35 Am. & Eng. R. Cases [Pa.], 551, it is said: "A railroad company has no right to make a delivery of freight otherwise than in strict accordance with the bill of lading."

In *Gates v. Chicago, B. & Q. R. Co.*, 42 Neb., 379, it was held: "The delivery of goods by a common carrier to the consignee thereof is made at the peril of the carrier, unless when made the consignee surrenders the bill of lading either made or indorsed to himself." (See, also, *Louisville & N. R. Co. v. Barkhouse*, 13 So. Rep. [Ala.], 534; *Weyand v. Atchison, T. & S. F. R. Co.*, 75 Ia., 580.)

In the light of these authorities we conclude: (1) That the Railway Company, by its bills of lading, contracted to transport the freight to Milwaukee and St. Louis and there deliver it to the consignee named in the bills of lading, namely, Brown Bros. Grain Company, or if the bills of lading had been transferred by them, then to the lawful holders of said bills; (2) that Bacon & Co., by honoring the drafts drawn against them by Brown Bros. Grain Company, with said bills of lading attached thereto and assigned to them, became and were entitled to have said grain delivered to them at Milwaukee and St. Louis; (3) that the Railway Company, by delivering said grain to the

consignees mentioned in said bills of lading, at a station intermediate the point of shipping and the point of destination, and without the surrender of the bills of lading, was guilty of a misdelivery and conversion of said grain.

3. It is suggested in argument here by the counsel for the Railway Company that it ought not to be held liable to Bacon & Co. for so much of the grain as was delivered to Brown Bros. Grain Company before they indorsed to Bacon & Co. the bills of lading for such grain. This position we think is untenable. In the first place the Railway Company, having issued these bills of lading, would be estopped as against the assignee and holder thereof for value from saying that it had never had such grain in its possession. (*Sioux City & P. R. Co. v. First Nat. Bank of Fremont*, 10 Neb., 556.) And the Railway Company, having received this grain and undertaken its transportation, by delivering it while in transit to the consignee named in the bill of lading and without the surrender of such bills of lading at the time put it in the power of Brown Bros. Grain Company to defraud third parties by selling the grain and indorsing the bills of lading. And the Railway Company is also liable for this grain on the familiar principle that where one of two innocent parties must suffer, he who by his conduct has enabled a wrongdoer to perpetrate a wrong must bear the loss rather than the party without fault. (*Walters v. Western & A. R. Co.*, 56 Fed. Rep., 369.) It was the duty of the Railway Company, the carrier, before delivering this grain to any person at any place, to take up the outstanding bills of lading which it had issued for it. So long as the bills of lading were outstanding they were representations by the Railway Company to the commercial world that it had in its possession and under its control and in transit to Milwaukee and St. Louis the grain for which the bills of lading called.

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There is no error in the record, and the judgment of the district court is

AFFIRMED.

EDWARD HOOPER ET AL. V. ABRAM CASTETTER
ET AL.

FILED MAY 2, 1895. No. 5798.

1. **Ruling on Motion to Set Aside Judicial Sale: REVIEW.**

In reviewing the action of the district court in refusing to set aside a sale, this court can consider only whether the district court erred in refusing to set aside the sale on the specific grounds assigned for that purpose in the motion filed in the court below.

2. ———: ———. This court cannot, either on appeal or error, say that the district court should or should not have set aside a sale for any reason or irregularity appearing in the record, unless such reason or irregularity was urged upon the district court as a reason for its action. *Smith v. Spaulding*, 40 Neb., 339, *Johnson v. Bemis*, 7 Neb., 224, and *Ecklund v. Willis*, 44 Neb., 129, followed and reaffirmed.

3. **Judicial Sales: CAVEAT EMPTOR.** A purchaser at a mortgage-foreclosure sale will not be relieved from completing his purchase on account of defective title, or on the ground of there being prior incumbrances on the property, when the true condition of the title is fully set out in the pleadings and the record of the proceedings under which the sale was made, as he is chargeable with the notice of such material facts as the record discloses. *Norton v. Nebraska Loan & Trust Co.*, 35 Neb., 466, followed and reaffirmed.

4. ———: **DECREE.** An officer selling property under execution or a decree in equity can sell such property on such terms, and such terms only, as are provided by the decree and the law in force governing such sale which is incorporated into and a part of such decree.
5. ———: **PAYMENT OF BID: SHERIFFS.** An officer selling property on execution or under a decree in equity has no authority to sell on credit or to accept in payment of the bid anything

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other than lawful money, unless otherwise expressly authorized by the terms of the decree or the law in force governing such sale.

6. ———: ———: ———. An officer who makes return to an order of sale, issued for the satisfaction of a decree in a mortgage foreclosure proceeding, that he sold the property described in such return to a designated bidder, is conclusively presumed to have made such sale for cash, less the amount of the purchaser's claim, if any, existing against said property and to satisfy which such sale was made, unless the decree on which said order of sale is based expressly authorizes a sale on credit.
7. ———: ———: RIGHTS OF PURCHASER: WAIVER OF ERRORS. A purchaser of property sold at judicial sale, who, after its confirmation, accepts a conveyance for said property executed in pursuance of such sale, its confirmation, and the order of the court, and who applies to and obtains from the court an order for a writ of possession for such property, thereby waives all errors and irregularities which occurred in the making of such sale and all objections and exceptions to the court's order of confirmation.
8. Review: TRIAL TO COURT: CONFLICTING EVIDENCE. The finding of a district court made on conflicting evidence, like the finding of a jury, is binding on this court if such finding is supported by sufficient evidence.
9. Mortgages: JUDICIAL SALES: DISTRIBUTION OF PROCEEDS. Certain real estate was incumbered by two mortgages. The holder of the second mortgage brought a suit in equity to foreclose, obtained a decree, and at a sale thereunder purchased the property. The holder of the first mortgage was not made a party to the foreclosure suit. After obtaining his decree, but before the sale, the holder of the second mortgage purchased and took an assignment to himself of the first mortgage. Held, That his ownership of the first mortgage did not of itself entitle him as against the mortgagor to a decree applying the surplus proceeds of the sale towards the liquidation of the mortgage purchased.
10. ———: DECREE OF FORECLOSURE: LIEN OF JUDGMENTS: HOMESTEAD: PROCEDURE IN ASSERTING RIGHTS: DISTRIBUTION OF PROCEEDS OF SALE. In a suit to foreclose a real estate mortgage, certain creditors of the mortgagor having ordinary judgments, apparent liens on the mortgaged property, were made parties defendant. They filed answers asking that their judgments might be paid out of any surplus arising from the sale of the property and remaining after satisfaction of the mortgage

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being foreclosed, and the decree rendered so provided. The mortgagor, though personally served, did not appear in the case until after a sale of the mortgaged property, when he applied to the court for an order to have \$2,000 of the surplus paid to him in lieu of his homestead exemption. *Held*, (1) That the mortgagor was entitled to the order; (2) that the question of the homestead rights of the mortgagor was not involved nor litigated in the foreclosure suit; (3) that the decree rendered in the foreclosure suit was not a bar to the mortgagor's application to have the surplus paid to him in lieu of his homestead; (4) that though the judgments were liens upon the real estate before the bringing of the foreclosure suit, such liens were subject to the mortgagor's homestead rights in the property; (5) that the decree in the foreclosure suit finding the judgments were liens, and ordering them paid out of the surplus, should be construed as if it read, that they were liens and should be paid out of the surplus, subject to the mortgagor's homestead rights; (6) that the mortgagor did not lose his homestead exemption because the real estate had been converted by a decree of court into money, nor did the judgment creditors acquire by the decree any greater liens upon or right to the money than they had against the property; (7) that the mortgagor might claim the surplus money in lieu of his homestead exemption at any time before such surplus was finally distributed by order of the court.

ERROR from the district court of Washington county.
Tried below before SCOTT, J.

See opinion for statement of the case.

Charles Offutt, for Abram Castetter :

The order of confirmation is erroneous, because no copy of the appraisement was deposited with the clerk of the district court. (*McKeighan v. Hopkins*, 14 Neb., 367; *Jones v. Mill*, 9 Neb., 254.)

The failure of the appraisers to deduct and enumerate prior incumbrances made the order of confirmation erroneous. (*Sessions v. Irwin*, 8 Neb., 5.)

The order of confirmation was erroneous, because Castetter's bid was not absolute, but was expressly conditioned upon the application of the mortgage for four thousand five

hundred dollars as part of the purchase price. (*Morrill v. Davis*, 27 Neb., 775; *Hurt v. Stull*, 4 Md. Ch., 391; *Armor v. Cochrane*, 66 Pa. St., 308; *Bozza v. Rowe*, 30 Ill., 198.)

Had the bid made for Castetter been unconditional it would not have bound him. (*Brown v. Johnson*, 51 Am. Dec. [Miss.], 118.)

The order of confirmation was also erroneous, because the bid was induced by the false representations and subsequently violated promises of the judgment debtor. (*Paulett v. Peabody*, 3 Neb., 196; *Frasher v. Ingham*, 4 Neb., 531; *Webster v. Haworth*, 8 Cal., 21; *Masson v. Bovel*, 1 Den. [N. Y.], 69; *Stevens v. McNamara*, 58 Am. Dec. [Me.], 740; *Spragg v. Shriver*, 64 Am. Dec. [Pa.], 698; *Ray v. Virgin*, 12 Ill., 216; *O'Kelley v. Gholston*, 15 S. E. Rep. [Ga.], 123; *Vannice v. Greene*, 16 Ia., 574; *Evans v. McGlasson*, 18 Ia., 150; *Butterfield v. Walsh*, 21 Ia., 97; *Wood v. Chopin*, 3 Kern. [N. Y.], 509.)

As to the question of distribution the following cases were cited: *Adams v. Angell*, L. R. 5, Ch. Div. [Eng.], 634; *Bullard v. Leach*, 27 Vt., 495; *Smith v. Swan*, 69 Ia., 412; *Pyke v. Gleason*, 60 Ia., 150; *Rector v. Rotton*, 3 Neb., 171; *Jackson v. Creighton*, 29 Neb., 310.

L. W. Osborn, for judgment creditors:

A decree foreclosing a mortgage is none the less final because subsequent proceedings under the direction of the court may be necessary to execute the decree. (*Bronson v. La Crosse & M. R. Co.*, 2 Black [U. S.], 531; *Ray v. Law*, 3 Cranch [U. S.], 179.)

The decree was conclusive. Nothing further was to be done except to make the sale and distribute the proceeds as directed by the decree. (Jones, Mortgages, secs. 1587, 1588; Freeman, Judgments, sec. 303, and cases cited.)

The Remingtons failed to assert their rights before the decree was entered and are concluded by it. (Freeman, Judgments, secs. 246-249.)

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As to homestead rights and waiver thereof the following authorities were cited: Jones, Mortgages, sec. 1632; *Chapman v. Lester*, 12 Kan., 592; *Searle v. Chapman*, 121 Mass., 19; *White v. Polleys*, 20 Wis., 504.

Jesse T. Davis, E. R. Duffie, and Francis A. Brogan, contra.

RAGAN, C.

Abram Castetter brought this suit in equity in the district court of Washington county against O. N. Remington and wife and a number of other persons, hereinafter designated "judgment creditors." The object of the action was to foreclose certain mortgages belonging to Castetter which had been executed and delivered to him by Remington and wife on certain real estate in said county. At the time the suit was brought the Scottish-American Investment Company held a mortgage upon this real estate for \$4,500. This mortgage had been executed by Remington and wife and was a first lien upon all the real estate involved in this action. No reference was made to this mortgage in any of the pleadings filed in this case, and the Scottish-American Company, the holder of the mortgage, was not made a party to the action. Remington and wife, though personally served with summons, made no appearance in the action. The judgment creditors appeared and filed answers, setting out certain judgments which they held against Remington, and asked that in case of a sale of the mortgaged premises under Castetter's mortgages, and after the satisfaction of such mortgages, that the surplus proceeds of the sale might be applied towards the satisfaction of their judgments. By the decree pronounced in the case the district court found the amount due Castetter on his mortgages made by Remington and the amount due each of the judgment creditors from Remington, but that the liens of Castetter and of the judgment creditors were each subject to the \$4,500

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mortgage held by the Scottish-American Investment Company as above stated. Aside from this mortgage Castetter's debt was declared to be the first lien upon the premises. The judgment creditors were declared to have liens upon the premises, subject to Castetter's, in the order of the date of the filing in the office of the clerk of the district court of said county of their judgments. The decree further provided for a sale of the mortgaged premises and the bringing of the proceeds into court to be applied to the liquidation of the amounts found due Castetter and the judgment creditors. The issuance of an order for the satisfaction of the decree was, at the request of Remington, stayed for nine months in pursuance of the statute. On the 28th of January, 1892, the order of sale was issued, and on the 7th of March, 1892, the sheriff returned said order of sale into court, reciting that he had on the 4th day of March, 1892, sold all the real estate described in the decree at public auction to Abram Castetter, the plaintiff in the action, for \$11,200. On the 9th of March, 1892, Castetter filed a motion to set aside the sale made by the sheriff, the only ground of this motion being "that the bid at said sale was made by this plaintiff under a total misapprehension of facts, as shown by affidavits filed in support of this motion." On the 27th of September, 1892, the court overruled the motion of Castetter to set aside the sale and confirmed it. To this ruling of the court Castetter took no exception, but at the same time made application for and obtained from the court an order for a writ of possession of the premises. After the rendition of said decree, but before the sale thereunder, Castetter purchased of the Scottish-American Investment Company its \$4,500 mortgage, took an assignment of the same, and owned and held said mortgage and the debt it secured at the date of the judicial sale. On the same day that the court overruled Castetter's motion to set aside this sale he filed in the case an application reciting the existence of this Scottish-

American Investment Company's mortgage as a first lien upon the premises at the time of the bringing of the suit, and that at the request of Remington he had purchased and taken an assignment of said mortgage after the rendition of the decree and before the sale herein; that he had made the purchase of said mortgage under an agreement with Remington that the amount due on said mortgage should be applied by him on whatever bid he might make for said mortgaged property at the sale thereof; and he prayed the court to order that after the amount found due him from Remington by the decree, with interest and costs, had been satisfied, the surplus proceeds arising from the sale of said property might be applied to the liquidation of the Scottish-American Company mortgage. This application the court denied. The judgment creditors also made application to the court for an order directing that whatever remained of the \$11,200, after paying the costs of the suit, and the amount found due Castetter by the decree, should be applied towards the payment of the amounts found due them on their judgments against Remington. This order the court refused, and on the application of Remington and wife ordered the amount found due Castetter by the decree, with interest and costs of the action, to be first paid out of the bid of \$11,200, and that out of the surplus there should be paid to Remington and wife \$2,000 in lieu of a homestead, and if any surplus then remained it should be distributed to the judgment creditors. Castetter has prosecuted to this court a petition in error to reverse the order of the district court overruling his motion to set aside the sale, and to reverse the order of the court overruling his application to have the surplus proceeds of the sale applied to a liquidation of the Scottish-American Company mortgage. The judgment creditors have prosecuted to this court a joint petition in error to reverse the order of the court postponing the payment of their judgments out of the surplus proceeds of the sale to the home-

stead claims of Remington and wife. We will first dispose of the petition in error of Castetter.

1. The order of the district court overruling Castetter's motion to set aside the sale: Counsel in his argument here alleges various irregularities as reasons why the court should have sustained Castetter's motion to set aside the sale. It is said that no copy of the appraisal of the property was deposited with the clerk of the court before the property was advertised and sold; that the appraisers failed to deduct and enumerate incumbrances upon the property which were prior to those for which the property was sold; that Castetter's bid was not absolute, but was a conditional bid; that he was not himself present at the sale, but the bid was made in his behalf by his agent and that this agent violated his instructions. As already seen, the only ground alleged by Castetter in his motion for setting aside this sale was that the bid made by him had been made under a misapprehension of facts. In *Johnson v. Bemis*, 7 Neb., 224, it was held: "A motion to set aside a sale, or order confirming a sale of real estate, should point out specifically the errors complained of. General objections are too indefinite to be considered." And in *Ecklund v. Willis*, 44 Neb., 129, it was held: "Objections to the confirmation of a sale of real estate must be specifically assigned in the motion filed in the lower court to vacate the sale, or they will be unavailing." In reviewing the action of the district court in refusing to set aside a sale this court can consider only whether the district court erred in refusing to set aside the sale on the specific grounds assigned for that purpose in the motion filed in the court below. We cannot on error or appeal say that the district court should or should not have set aside a sale for any reason or irregularity appearing in the record unless such reason or irregularity was urged upon the district court as a reason for this action. (*Smith v. Spaulding*, 40 Neb., 339.) Therefore, in the case under consideration,

in determining whether the court erred in refusing to set aside this sale, our inquiry must be limited to the correctness of the conclusion of the district court that the bid made by Castetter was made under a misapprehension of the facts. The evidence to this point on behalf of Castetter tends to show that he purchased the Scottish-American mortgage before the sale at the request of Remington and under an agreement with him that the amount due on this mortgage should be paid instead of money to satisfy the bid which Castetter might make for the mortgaged premises, and that Castetter, at the time of the sale, understood and believed that the Scottish-American mortgage was included in the decree; that whatever was bid at the sale for the property would have to be applied to the discharge of that mortgage, and that Remington concealed from him, Castetter, the fact that the Scottish-American mortgage was not foreclosed in this decree. On the other hand, Remington positively and unequivocally denies that he ever requested or induced Castetter to purchase the Scottish-American mortgage, or knew that he had done so prior to the sale. The evidence in the bill of exceptions is not such as enables us to say that the finding of the district court in favor of Remington, that he did not request or induce Castetter to purchase this Scottish-American mortgage, and that he did not conceal from Castetter the fact that this mortgage was not embraced in the decree, is unsupported by sufficient evidence; and if, for the purposes of this case, we assume that Castetter, at the time he made the bid, was under the impression or belief that the proceeds of such bid would have to be first applied to the payment of the Scottish-American mortgage, we are still unable to say how such a misapprehension could avail Castetter here. He was the plaintiff in this action, and it must be presumed that he knew the averments of his petition and for what relief he prayed therein, and it must also be presumed that he knew the terms of the decree.

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Whatever may be the rule elsewhere, the doctrine of this court is that the rule of *caveat emptor* applies to a purchaser of real estate at a judicial sale thereof; that he is bound to examine the title which he is about to purchase; that he cannot even rely upon statements made by the officer conducting the sale as to the condition of the title; and if he buys without such examination, he does so at his peril and must suffer for his neglect. See *Norton v. Nebraska Loan & Trust Co.*, 35 Neb., 466, where it was held: "A purchaser at a mortgage foreclosure sale will not be relieved from completing his purchase on account of defective title, or on the ground of there being prior incumbrances on the property, when the true condition of the title is fully set out in the pleadings and the record of the proceedings under which the sale was made, as he is chargeable with notice of such material facts as the records disclose." This case was again before the court in 40 Neb., 394, and reaffirmed. Again, if we assume that Castetter's contention is true, that he purchased the Scottish-American mortgage at the request of Remington, and that he was induced to make the bid he did because of an agreement with Remington that the amount due on such mortgage should be applied in satisfaction of such bid instead of paying money, we would still be unable to say that the district court was wrong in refusing to set aside the sale for that reason. Section 854 of the Code of Civil Procedure provides: "The proceeds of every sale made under a decree in chancery shall be applied to the discharge of the debt adjudged by such court to be due, and of the costs awarded, and if there be any surplus it shall be brought into court for the use of the defendant, or of the person entitled thereto, subject to the order of the court." An officer selling property under execution or a decree in equity can sell such property on such terms, and such terms only, as are provided by the decree and the law in force governing such sale, which is

incorporated into and a part of such decree. In other words, an officer selling property on execution or under a decree in equity has no authority to sell on credit unless by the express terms of the decree or by the statute he is so authorized. (Freeman, Executions, sec. 300; *Swope v. Ardery*, 5 Ind., 213.) In the case at bar the officer was directed to sell at public auction to the highest bidder the real estate described in the decree, and he was authorized to sell it, and sell it only for cash, but by reason of the statute and by reason of the fact that Castetter had been given a lien against the real estate sold and for which it was sold, the officer was authorized to accept from Castetter the amount of this decree as money. Therefore, if it was the agreement between Remington and Castetter that the latter should turn in to the sheriff the Scottish-American mortgage as a part of the \$11,200 bid by Castetter for the premises, the sheriff would have had no authority to accept such mortgage in lieu of money and having made a return into court that he had sold this property to Castetter for \$11,200, he is conclusively presumed to have collected this money from Castetter, less the amount of Castetter's decree against the property. The officer could not be heard in this or any other proceeding to say that he accepted from Castetter for the excess of the bid over and above his decree anything other than money. After the court had overruled the motion of Castetter to set aside this sale, he applied to and obtained from the court an order for a writ putting him in possession of the premises. The evidence also shows that the sheriff executed and delivered to Castetter, or his agent, a deed for these premises. Castetter, or his agent, paid the fee for recording this deed, and, it would seem, took possession of the premises. At least Castetter listed these lands with a real estate agent for sale. Here, then, was a waiver by Castetter of all errors and irregularities, if any there were, which occurred in the making of this sale, and a waiver of all objections and exceptions to

the order of the court in confirming it. For the foregoing reasons we conclude that the district court did not err in overruling the motion of Castetter to set aside the sale and in confirming the same.

2. Did the court err in refusing to apply the excess of Castetter's bid remaining, after discharging the amount found due him by the decree and the costs of the case, towards the liquidation of the Scottish-American mortgage? As already stated, this application of the surplus was asked by Castetter on the grounds that he had advanced the money, purchased and taken an assignment of this Scottish-American mortgage, at the request of Remington and under an agreement with him that he should turn in this mortgage and apply it on whatever bid he might make upon the land at the foreclosure sale instead of so much money. The evidence in the record in behalf of Castetter tends to support his contention. Castetter and his agent and others testify that this was the agreement and understanding with Remington. The evidence also tends to show that Castetter bid for this land more than it was worth because of this agreement. On the other hand Remington positively swears that he never requested or induced Castetter to purchase this Scottish-American mortgage, and that he did not know he had purchased it until after the sale; that he never had any agreement with Castetter by which the latter was to apply this mortgage on any bid he might make at a sale of the property. The appraisal made of the land under the direction of the sheriff holding the order of sale shows that the land was appraised at \$40 per acre, the amount bid for it by Castetter. The evidence also discloses that at the sale there was some competition. That a man named Shields bid \$30 per acre for the property, that Castetter then bid \$35 per acre, and that Shields then bid \$37.50 per acre, whereupon Castetter bid \$40 per acre for the property and it was struck off to him at that price. The finding of a district court, made on conflicting

evidence, like the finding of a jury, is binding upon this court if such finding is supported by sufficient evidence. Had we been trying this question of fact it may be that we would have reached a different conclusion from that reached by the learned district judge, but that consideration does not authorize us to say that the district court came to the incorrect conclusion. We do not feel at liberty to disturb this finding, as there is sufficient evidence in the record to sustain it. If, then, Castetter took an assignment of this mortgage without the solicitation of Remington, without his knowledge, and without any agreement on the part of Remington that the mortgage should be applied upon whatever bid Castetter might make upon the land, it would be inequitable to apply the surplus in the hands of the sheriff arising from the sale made towards the liquidation of that mortgage. Counsel for Castetter seems to be of opinion that the district court denied his client's application to apply the surplus from the sale on the Scottish-American mortgage on the ground that when Castetter purchased the premises at the foreclosure sale that his lien upon the premises acquired by virtue of his purchase of the Scottish-American mortgage was merged in the title acquired at the foreclosure sale. We do not think that the district court denied the application of counsel's client on this ground; nor do we think that it necessarily follows that the mortgage purchased by Castetter from the Scottish-American Company was extinguished or merged by Castetter's purchase of the premises. Whether the mortgage was extinguished or merged by Castetter's purchase was a matter which rested in his volition. If he desired to keep the mortgage alive upon the premises, and at the same time hold the legal title to the premises, we know of no principle of law which prevented it; nor do we perceive how that question could have been material or have influenced the court in the consideration of the application made by Castetter to apply the surplus bid to the extinguishment of

such mortgage. Keeping in view the finding of fact made by the district court, Castetter has no more right to have the surplus proceeds of the sale applied to the liquidation of the Scottish-American mortgage than would a stranger to the proceedings have, had such stranger purchased this Scottish-American mortgage and taken an assignment of it after a decree rendered against the Remingtons and in favor of Castetter; and it will scarcely be contended that had a stranger purchased this mortgage at the time Castetter did that his ownership of the mortgage would have entitled him to have the surplus proceeds arising from the foreclosure sale applied to its discharge; or that the Scottish-American Mortgage Company would have such right.

3. Petition in error of the judgment creditors. As already stated, certain persons whom we have designated judgment creditors were made defendants to the foreclosure suit brought by Castetter. These parties, and each of them, had ordinary money judgments against Remington. They filed their answers in the action, setting out their judgments and asking that the judgments be paid out of whatever surplus there might be in the hands of the officer after a sale of the property and a payment of Castetter's liens; and the district court, by its decree, found what was due to each of the judgment creditors from Remington; that the amount found due was a lien upon the real estate; ordered the property sold and the proceeds brought into court to be applied in satisfaction of the sums found due Castetter and the judgment creditors. Neither Remington nor his wife appeared in the action, and a decree was rendered against them by default. After the premises had been sold at a foreclosure sale, after the costs and expenses of the suit and the amount found due Castetter had been paid, the judgment creditors claimed the surplus remaining should be applied upon their judgments against Remington. On the other hand, Remington and his wife at that time filed an application to have \$2,000 of the surplus paid to them in

lieu of their homestead. The court directed \$2,000 of the surplus to be paid to the Remingtons in lieu of their homestead; and it is to reverse this order that the judgment creditors have filed here their petition in error. The argument is that the Remingtons are concluded and estopped by the decree in the foreclosure suit which found that the amounts due to them from Remington were liens upon the real estate. Without going into any extended discussion, we are satisfied that the contention must be overruled. The judgments of the judgment creditors were liens upon this real estate before the bringing of the foreclosure suit; but while they were liens upon the real estate, the lien was subject to the homestead rights of the Remingtons. The fact that they set up their judgments in their answers filed in the foreclosure suit, and that the court found that they were liens upon the real estate, added nothing whatever to the character of these judgment liens. The decree must be construed as if read: The judgments are liens upon and to be paid out of the surplus, subject to the homestead rights of the Remingtons. The question of the right of the Remingtons to hold a part of the land as a homestead was not involved in, nor litigated in, the foreclosure suit; and that decree constitutes no bar to their application to have the surplus paid to them in lieu of their homestead. (*Mooers v. Dixon*, 35 Ill., 208; *Wing v. Cropper*, 35 Ill., 256; *Hoskins v. Litchfield*, 31 Ill., 137; *Moore v. Titman*, 33 Ill., 358; *Sears v. Hanks*, 14 O. St., 298.) At no time could the judgment creditors have sold the homestead of the Remingtons for the satisfaction of their judgment; but since the homestead was pledged for the payment of the Castetter mortgage, the court had authority to decree that it be sold for that purpose. But if the sheriff could have satisfied the Castetter mortgage by a sale of a portion of the premises, it would have been his duty, and doubtless he would have done so; and had a portion of the land occupied by the Remingtons of the value of

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\$2,000 remained unsold, the judgment creditors would have had no authority to have such portion of land sold for the satisfaction of their judgments. The Remingtons did not lose their exemption because the property had been converted by a decree of the court into money, nor did the judgment creditors acquire any greater liens upon or right to this money than they had to or against the property. The Remingtons had a right to claim this surplus money in lieu of their homestead exemption at any time before it was finally distributed. The decree of the district court is in all things

AFFIRMED.

JAMES BINGHAM V. SAMUEL SHADLE ET AL.

FILED MAY 2, 1895. NO. 6422.

1. **Appeal Bonds:** APPROVAL BY JUSTICE OF THE PEACE. An undertaking given for the purpose of appealing a case from a justice of the peace to the district court is approved by the justice, if he receives it, examines it, and expresses himself as "satisfied," and retains it in his custody.
2. **Alteration of Instruments.** Where a written instrument is altered by one not claiming under it, the party claiming under it may still enforce it so long as its original character is susceptible of proof.
3. **Appeal Bonds:** ALTERATION: LIABILITY OF SURETIES. Therefore, where, after an appeal undertaking had been approved by the justice, some of the sureties erased their names therefrom, this did not release them from liability, and consequently did not release their co-sureties, the obligee not knowing of or consenting to the change.
4. ———: ———. The fact that the justice knew of the erasure was not material. It was beyond his power after approving the bond to deprive the obligee of his security.

ERROR from the district court of Custer county. Tried below before HOLCOMB, J.

Henry M. Kidder, for plaintiff in error.

Judson C. Porter, *contra*.

IRVINE, C.

This was an action by Bingham against Shadle and nine others, on an appeal undertaking in a case taken from a justice of the peace to the district court, the defendants being the sureties on the undertaking. The defense was that the bond was signed by each one under an agreement that all should sign, but that before approval the signatures of three of the defendants were erased, whereby it is claimed all were discharged. The case was tried to the court without a jury. The court found generally for the defendants, and then found specially that three of the defendants, before the bond was approved, erased their names therefrom with the knowledge and without objection on the part of the justice, and without the knowledge or consent of the other sureties. Judgment was entered for the defendants.

The facts appear without any material conflict in the evidence. The ten defendants signed the appeal undertaking. The appellant then delivered the undertaking to the justice, who received it, examined it, and expressed himself as "satisfied." Owing to the press of other business he laid the bond aside without indorsing his approval in writing thereon. Subsequently, three of the sureties came to his office, asked for the bond, and erased their names therefrom. The justice knew this fact. He thereafter indorsed his approval on the bond. On this evidence we think the learned district judge erred in finding that the erasures were made before approval. In *Asch v. Wiley*, 16 Neb., 41, an appeal bond had been presented to the county judge within the time required by law. It was received by him, filed and spread upon his docket. He afterwards indorsed upon it that it was not approved. This court held that if the justice did not intend to approve the

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bond he should have refused to receive it and notified the appellant of that fact, and that his receiving the bond and filing it, and spreading it upon his docket, constituted an approval. This decision is in accordance with the great weight of authority elsewhere. In view of the reasons given we cannot regard the spreading of the bond upon the docket as an essential part of its approval. A paper is filed when it is delivered in due order to the proper officer for custody or such action as the law requires of him. (*Cook v. Hall*, 1 Gilm. [Ill.], 575; *King v. Wade*, 1 B. & Ad. [Eng.], 861; *Naylor v. Moody*, 2 Blackf. [Ind.], 247; *Gorham v. Summers*, 25 Minn., 81; *Fanning v. Fly*, 2 Cold. [Tenn.], 486.) This bond was therefore filed, and the justice's approval affirmatively given. The notation of the approval on the bond was only evidence of this fact, and it was proper to show by parol the precise time of approval. (*Woodburn v. Fleming*, 1 Blackf. [Ind.], 4; *McCloskey v. Indianapolis Manufacturers' & Carpenters' Union*, 87 Ind., 20; *Williams v. McConico*, 25 Ala., 538.) The bond had, therefore, become a complete obligation before the names of the three sureties were erased. It was formerly the law that any material alteration, even though made by a stranger, avoided a written instrument; but the injustice and unreasonableness of this rule have led to its abandonment of late years. It is now the law that an instrument is avoided by a material alteration made by the person claiming under it. But where the change is made by a stranger, without the consent of the person claiming under the instrument, it is usually designated a spoliation or mutilation, and the instrument may still be enforced, so long as its original character is susceptible of proof. (*Waring v. Smyth*, 2 Barb. Ch. [N. Y.], 119; *United States v. Spalding*, 2 Mason [U. S.], 482; *Medlin v. Platte County*, 8 Mo., 235; *Boyd v. McConnel*, 10 Humph. [Tenn.], 68; *Barrington v. Bank of Washington*, 14 S. & R. [Pa.], 405.) The fact that the justice knew of the erasure does not charge the plaintiff with no-

tice. The justice acted officially, and not as the plaintiff's agent. The bond was for the plaintiff's benefit, and it was beyond the power of the justice, after the bond became complete by approval, to rescind it, or by any act or consent of his to deprive the plaintiff of his security. If alteration by a stranger without the consent of the person entitled could not defeat the bond, *a fortiori* it could not be defeated by the act of the obligors themselves. These three sureties could not relieve themselves from a vested obligation by striking their names off the instrument; and it follows that if their obligation remained, the erasure of their names in nowise affected the bond, and was not material to the rights of their co-sureties. We think that the district court, under the facts proved, should have rendered judgment in favor of the plaintiff, against all the defendants before the court.

The conclusion reached seems at first to be contrary to the doctrine announced in *Martin v. Thomas*, 24 How. [U. S.], 315. But an inspection of that case shows that the signature to the bond there in question was erased with the consent of the obligee, and without the consent of the other obligors.

The case of *Smith v. United States*, 2 Wall. [U. S.], 219, was a case very similar to the present, except that the signature was erased before the bond was approved. The argument there was that the sureties were released because of that fact, and this contention was sustained by the court. It was clear in that case that the erasure having been made before the bond was approved, the surety who erased his name was not bound, and the court, following the rules in relation to suretyship, held that this was a material change in the contract, which released the other surety. But in that case the modern rule restricting the avoiding of instruments by alterations to such as are made by, or with the consent of, the person entitled was distinctly approved.

REVERSED AND REMANDED.

DAVID E. SEDGWICK V. M. A. DURHAM ET AL.

FILED MAY 2, 1895. No. 6181.

1. **County Courts: BILL OF EXCEPTIONS.** The procedure in county courts in regard to bills of exceptions is governed by the law relating to justices of the peace.
2. **Bill of Exceptions.** The provisions of section 587a of the Code of Civil Procedure authorizing the certification of the original bill of exceptions are confined to proceedings in the supreme court reviewing judgments of district courts. The original bill of exceptions cannot be certified from a county court to the district court.
3. **Justice of the Peace: COUNTY COURTS: EXCEPTIONS: TRANSCRIPTS FOR REVIEW.** The manner of preserving exceptions in county courts and before justices of the peace is provided by sections 988 and 1026 of the Code. The exceptions must be entered upon the docket of the justice or county judge and be presented to the district court by a transcript of that docket.

ERROR from the district court of York county. Tried below before BATES, J.

Sedgwick & Power, for plaintiff in error.

George B. France, *contra*.

IRVINE, C.

Sedgwick recovered a judgment for \$239.46, against the defendants in error, in the county court of York county, the case having been tried to a jury. Defendants prosecuted error to the district court, where the judgment of the county court was reversed. From the order of reversal the plaintiff prosecutes error to this court.

There was attached to the transcript, as filed in the district court, a document purporting to be a bill of exceptions, embodying the evidence taken on the trial in the

county court. Before hearing in the district court a motion was made to quash this bill of exceptions because it was never made a part of the record; because no exceptions were entered on the docket of the county court; because the bill was not certified by the county judge to be a true bill, and because the bill had never been submitted to plaintiff's attorneys for examination. The district court overruled the motion to quash. This ruling is one of the errors here assigned. The transcript of the record attached to the petition in error filed in the district court discloses no exceptions whatever. The certificate to this transcript is "That the foregoing is a full and correct copy of my docket of all the proceedings had before me in said case, together with the original bill of exceptions." The bill of exceptions itself is not signed, sealed, or its allowance in anywise authenticated. It is well settled that county courts, even when acting within their special jurisdiction, are governed as to procedure, except where otherwise specified, by the laws regulating procedure before justices of the peace, and that the law in regard to bills of exceptions in cases tried before justices of the peace applies to county courts. (*Taylor v. Tilden*, 3 Neb., 339; *Moline, Milburn & Standard Co. v. Curtis*, 38 Neb., 520.) The provisions of section 311 of the Code of Civil Procedure do not apply to justices of the peace. (*Leach v. Sutphen*, 11 Neb., 527.) There is, therefore, no requirement that the bill of exceptions in a case tried in the county court, or before a justice of the peace, be submitted to the adverse party before its allowance. The last ground for quashing the bill was, therefore, not well taken. The bill should, however, have been quashed for other reasons. There is no authority for certifying the original bill of exceptions in such a case. Such a course is only permitted in any case because of section 587a of the Code of Civil Procedure, which permits the original bill of exceptions to be certified up from the district court to the supreme court. The statute expressly

confines the practice to such a case. The provisions in regard to bills of exceptions before justices of the peace, and consequently county courts, are found in section 988 and 1086 of the Code of Civil Procedure. By section 988, in all cases tried by a jury either party shall have the right to except to the opinion of the justice upon any question of law arising during the trial of the cause; and when either party shall allege such exception, it shall be the duty of the justice to sign and seal a bill containing such exception, if truly alleged, with the point decided, so that the same may be made a part of the record in the cause. By section 1086 it is made the duty of the justice to enter these exceptions on his docket; and by section 1087 he may enter the exceptions after the trial, unless required to enter them at the time by one of the parties. The exceptions thus become a part of the record, and the transcript thereof filed in the district court with the petition in error preserves the exceptions for review in the district court. No exceptions were in this case entered upon the docket, and it does not even appear from the docket that any exceptions were taken. The document filed in the district court was, therefore, neither in form nor substance a bill of exceptions such as the law permits in such a case, and the district court erred in overruling the motion to quash. Similar questions seem to have been raised in the case of *Hawley v. Robeson*, 14 Neb., 435; but the court then refused to consider them, because they had not been raised in the district court. Here the questions were properly raised in the district court. A recent act of the legislature may affect the questions herein discussed, but as that act has not yet gone into operation, it does not affect this case, and no opinion is expressed as to its construction.

All the errors assigned in the district court relating to matters occurring on the trial are disclosed only by the bill of exceptions. As the district court should not have considered this bill, it follows that it should not have reversed

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the judgment of the county court. The judgment of the district court is reversed and that of the county court affirmed.

JUDGMENT ACCORDINGLY.

DUFF GREEN, APPELLEE, v. GEORGE W. HALL ET AL.,
IMPLEADED WITH EDWIN H. SHERWOOD ET AL.,
APPELLANTS.

FILED MAY 4, 1895. No. 5931.

1. **Mortgages: ASSUMPTION OF PAYMENT BY PURCHASER OF LAND: EVIDENCE.** An alleged agreement to pay an existing mortgage, as part of the consideration for the conveyance of mortgaged premises, is not established by recitations in the deed of conveyance that such deed is subject to said mortgage, nor a mere recitation that said mortgage is part of the consideration or purchase price.
2. ———: ———: ———. A binding assumption of the payment of a mortgage by the grantee in a deed which merely recites the existence of such mortgage on the premises conveyed, and that such mortgage is a part of the consideration or purchase price, cannot be established by proof that subsequent to the execution of such deed the grantee therein named, orally, and without consideration, promised the mortgagee that he would pay such mortgage.
3. ———: ———: ———: **DEFICIENCY JUDGMENT.** To entitle the holder of a mortgage to a deficiency judgment against a purchaser of the premises mortgaged the proofs must be such as would enable such mortgagee to maintain against such purchaser an action for the amount secured by said mortgage.

APPEAL from the district court of Douglas county.
Heard below before DAVIS, J.

The facts are stated by the commissioner.

E. W. Simeral and *William Simeral*, for appellants:

Evidence of a parol agreement by the vendees to assume

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payment of the mortgage is inadmissible. (*Lewis v. Day*, 53 Ia., 575; *Remington v. Palmer*, 62 N. Y., 31; *Conover v. Brown*, 29 N. J. Eq., 510.)

The recital in the deed that the land is sold subject to a mortgage should not be made the basis of a deficiency judgment against the purchaser. (Jones, Mortgages [2d ed.], sec. 751; *Bennett v. Bates*, 94 N. Y., 354.)

Kennedy, Gilbert & Anderson, contra:

The deficiency judgment is justified under the rulings in *Rockwell v. Blair Savings Bank*, 31 Neb., 128.

The following cases were also cited as to appellee's right to a deficiency judgment: *Marriman v. Moore*, 90 Pa. St., 78; *Crowell v. Hospital of St. Barnabas*, 27 N. J. Eq., 650; *Ferris v. Crawford*, 2 Denio [N. Y.], 595; *Wood v. Smith*, 51 Ia., 156; *Russell v. Ostrander*, 30 How. Pr. [N. Y.], 93; *Wright v. Briggs*, 99 Ind., 563; *Stover v. Tompkins*, 34 Neb., 465; *Dean v. Walker*, 107 Ill., 540.

RYAN, C.

This action was brought in the district court of Douglas county for the foreclosure of a mortgage made February 28, 1889, by the defendants George W. Hall and Helen M. Hall to plaintiff, securing payment of the sum of \$6,000, due in five years from said date, which debt was evidenced by two promissory notes, one for \$4,000 and the other for \$2,000. On March 28, 1889, George W. Hall and his wife conveyed the mortgaged premises to Victor H. Coffman. This deed was by its terms subject to the above described mortgage, which mortgage was expressly excepted from the covenants of warranty. On the 14th day of October, 1889, Victor H. Coffman, his wife joining, conveyed the mortgaged premises to Arvilla Allyn. This deed was made expressly subject to the above mortgage. On February 20, 1890, Arvilla Allyn and her husband reconveyed the mortgaged property to Victor H. Coffman

as expressed in their deed, subject to the mortgage thereon. On the first day of April, 1890, Victor H. Coffman and his wife conveyed the said real property to Edwin H. Sherwood, likewise subject to the mortgage above described, and in the deed of conveyance it was further recited that the said mortgage was "part of the above mentioned consideration, or the purchase price" (\$16,000). In the above mentioned petition for a foreclosure the aforesaid conveyances were identified in very general terms, following which descriptions the averments were as follows: "That each of said deeds, in express terms, is made subject to said mortgage of \$6,000, and said mortgage debt is charged upon the purchase money in each deed as a part thereof, and said mortgage is expressly executed [probably excepted] in the covenant of warranty in each deed, and each grantee assumes and agrees to pay said mortgage debt and indemnify his grantor against the same. * * * * * That there is now due from said George W. Hall and his said grantees on said notes and mortgage the sum of \$6,000, with interest, payable annually, at the rate of eight per cent per annum." Following the prayer for a foreclosure and a sale thereunder for satisfaction of the amount secured by the mortgage there was this language: "That on the coming in of the report of such sale, if the court find a balance of the mortgage debt remaining unsatisfied, the court decree, adjudge, and direct the payment thereof by said George W. Hall and his said grantees, viz., Edwin H. Sherwood, Victor H. Coffman, and Arvilla Allyn, according to their respective legal liability," etc. There was a foreclosure and sale, from which there were net proceeds sufficient to justify the application on the amount found due upon a confirmation of such credits as left a deficiency of \$3,578.10, for which Edwin H. Sherwood, Victor H. Coffman, and Arvilla Allyn were held liable as recited in the decree, "upon the promissory notes set forth in the petition." From this deficiency judgment Sherwood and Coffman alone appeal.

The appellee confidently relies upon the case of *Rockwell v. Blair Savings Bank*, 31 Neb., 128, to sustain the personal judgment rendered against the appellants. In the case cited the Rockwells mortgaged to the bank certain real property which they afterwards conveyed to Isaac Tebury. A foreclosure was subsequently decreed in favor of the bank, and the mortgaged property sold, leaving unpaid a deficiency, for which the district court refused to enter judgment against Tebury, though judgment therefor was duly rendered against the Rockwells, by whom, on that account, error proceedings were prosecuted to this court. On the subject of Tebury's liability the language of the opinion was as follows: "Austin Rockwell and Isaac Tebury were the only persons who gave testimony as to the terms of the agreement for the sale of the lot. The testimony of these witnesses agrees that the purchase price was \$2,500; that Tebury only paid the Rockwells \$300; that he never agreed to pay the balance of the consideration to them, and gave no obligation for the remainder of the contract price. Tebury knew of the existence of the mortgage for \$2,200 held by the bank when the sale was made, and after obtaining the deed he paid three installments of interest on the lien. Austin Rockwell also testified that Tebury agreed to pay the amount due the bank on the mortgage. This testimony is not overcome by the evidence of Tebury. * * * He makes no claim in his testimony that he only bought the Rockwells' equity of redemption, but admits that he was to pay \$2,500 for the property; that he only paid \$300 on the same, and that the mortgage holds the balance. The testimony establishes beyond any question that Tebury retained part of the purchase price to pay the \$2,200 incumbrance. He thereby made the mortgage debt his own, and is, therefore, personally liable with the Rockwells for the amount of the deficiency remaining after the foreclosure of the mortgaged premises. In *Cooper v. Foss*, 15 Neb., 515, the same doctrine was held and applied by Chief Justice COBB."

In the answer of the Rockwells it was alleged, in substance, as we learn from the opinion above quoted from, "that on the 24th day of March, 1887, they sold and conveyed the lot to Tebury, who, as a part of the purchase price, assumed and agreed to pay the said note and mortgage." In the case at bar it is doubtful whether or not there was an averment of an undertaking on the part of Coffman or Sherwood independently of the deed to each of them. The language, which has already been quoted so far as it relates to this subject, first stated what was believed by the pleader to be the legal effect of the language of the deeds described. By the petition it was charged that each conveyance was made subject to the existing mortgage and that by the language of each conveyance the mortgage debt was charged upon the purchase price in each deed as a part thereof, and that said mortgage was expressly excepted from the covenants of warranty in each deed, and that each grantee had assumed and agreed to pay said mortgage debt and indemnify his grantor against the same. It is possible to construe the averment last mentioned as one independent of the language of the deeds of conveyance. There are presented then by this petition, liberally construed, two questions; the one of the proper construction of the language of the deeds in question, the other a question of fact dependent upon oral evidence for proof of its existence. There was no conflict in the testimony given orally that the property was conveyed by the Halls to V. H. Coffman, subject to the above mortgage, in exchange for other real property also incumbered. The consideration recited in this deed to him therefore does not materially aid us as to the question of construction presented. The deed from Coffman to Arvilla Allyn and from Arvilla Allyn back to Coffman are scarcely referred to, much less explained, by the testimony adduced. The conveyance by Coffman to Sherwood was in consideration of other mortgaged property conveyed by Sherwood to Coffman. From a consid-

eration of the deeds, therefore, it cannot be said, or even assumed, that there was devolved upon each grantee an obligation to pay off the mortgage to Duff Green. The recitation in respect to this incumbrance found in the deed from Coffman to Sherwood, that it was "part of the above consideration or the purchase price," cuts no special figure, for that did not constitute such an agreement to pay the amount secured by the mortgage to Green, the mortgagee, that he could have obtained a personal judgment upon it against Sherwood, and this, in legal effect, was what was accomplished by the successful prayer for a deficiency judgment to the amount of the balance of the mortgage remaining unpaid after a sale on foreclosure. We conclude, therefore, that upon consideration of the terms of the deeds alone there was established against neither Coffman nor Sherwood such a liability to Duff Green as was enforceable by a deficiency judgment against either of them. The oral evidence showed, without contradiction, that in fact the deeds upon which Sherwood and Coffman were held liable personally were the consummations of exchanges of what witnesses describe as equities of redemption in the properties conveyed. In some states this term has an obvious signification, and from such states its use has probably been brought into this state, where it seems to be employed to describe such interest in real property as is retained by the owner after he has mortgaged it. Whether or not this is the general acceptance of this term is not so important, as that it was so accepted and understood by the parties and witnesses in this case. There was no agreement that there should be an undertaking by any one to pay the mortgage to Green. It was understood by all parties that the property was to be taken simply subject to Green's mortgage; in fact, so far as his rights were concerned, the agreements would have been fully expressed if nothing but quitclaim deeds had been used, for, in law, any purchaser of property upon which there is a mortgage duly recorded takes it sub-

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ject to such mortgage. The case of *Rockwell v. Blair Savings Bank*, *supra*, therefore furnishes no warrant for the recovery of a deficiency judgment in this case; indeed quite the contrary is the tendency of the reasoning therein. (*Reynolds v. Dietz*, 39 Neb., 180.)

It was attempted by the testimony of Duff Green to show that subsequent to the making of the deed to Coffman, and that to Sherwood, each of these trustees had orally promised to pay the amount secured by the mortgage held by Green. This naked promise, if established by sufficient proof, was without consideration, and, considered by itself, was simply one to answer for the debt of another, and, therefore, not being in writing, was not enforceable. The deficiency judgment of the district court against the appellants is

REVERSED.

ADDISON P. WESTON, APPELLANT, v. JOSEPHINE
MEYERS ET AL., APPELLEES.

FILED MAY 4, 1895. No. 6089.

Quieting Title: REMOVAL OF CLOUD CREATED BY TAX DEED:
PLEADING: TAX LIENS: SUBROGATION. Appellant in a suit in equity alleged in his petition that he was the owner of certain real estate and entitled to the possession thereof; that appellee claimed an interest in said premises by virtue of a tax deed; that "there was no legal and sufficient levy of the taxes," for which said real estate was sold and on which said tax deed was based. He prayed that the tax sale and deed, and appellee's title by virtue thereof, might be decreed void; that the title to the real estate might be quieted in, and the possession of the premises awarded to, appellant. The petition contained no offer to pay appellee any sum the court might find he had paid to purchase the premises at the tax sale or for taxes subsequently paid on the premises. *Held*, (1) That the averment in the petition that "there was no legal and sufficient levy of the taxes"

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was a mere conclusion; (2) that the tax levied became by virtue of the statute a lien on the real estate until paid or barred by law; (3) that the appellee by his purchase of the real estate for such taxes, although the sale was an invalid one, became thereby subrogated to the right of the public, and this right was a lien upon the real estate for the taxes paid until paid or barred; (4) that he who asks equity must do equity; and as the appellant did not offer in his petition to pay the appellee whatever sum the court might find he had paid out for the purchase of the premises at the tax sale, nor for legal taxes subsequently paid on the premises, the petition did not state facts entitling the appellant to equitable relief.

APPEAL from the district court of Otoe county. Heard below before CHAPMAN, J.

C. W. Seymour, for appellant.

John C. Watson and *John A. Rooney*, contra.

RAGAN, C.

This suit was brought in the name of Addison P. Weston in the district court of Otoe county against Josephine Meyers and her husband. The petition alleged that Weston was the owner of the legal title and entitled to the immediate possession of certain described property in the city of Nebraska City; that the defendant Josephine Meyers set up and claimed an interest in and to said premises adverse to the interest of Weston; that Meyers was the owner and holder of a certain pretended tax deed to the premises, dated November 27, 1885; that said pretended tax deed purports to be based upon the sale of said premises for the alleged delinquent taxes for the year A. D. 1879; that the pretended sale of said premises for said year was wholly illegal and void; that the premises were not properly assessed for taxes, "and that there was no legal and sufficient levy of taxes for said year." The petition then averred that said premises were not offered at public sale for the taxes for the year 1879; that the treasurer of the county

did not make a return of his sale of lands for taxes of said year; that the treasurer did not file in the office of the county clerk a notice of sale of lands for taxes for said year, nor a certificate of the advertisement verified by affidavit; that during the years 1880, 1881, 1883, 1884, and 1885 Weston was a resident of the state of Nebraska, and that he was not served with a personal notice before the time of redeeming of said tax sale expired or at any other time; and that in the year 1879 he was the owner of personal property in Cass county, where he then resided, out of which the taxes due from him on said lands could have been collected; and that the treasurer of said Otoe county made no attempt whatever to collect said taxes out of his personal property. The prayer of the petition was that the parties made defendants might be compelled to show their title to the real estate; that such title might be determined null and void; that the pretended tax sale of 1879 might be declared null and void; that the tax deed might be set aside; and that the court should decree that the parties made defendants had no estate in, or lien upon, said premises. It is not necessary to set out the averments of the answer. The district court found the issues in favor of the defendants and dismissed the petition, and the case is before us on appeal.

The district court found specially that Weston was not the real party in interest in this action. The evidence on this issue is somewhat unsatisfactory, but we think it is sufficient to support the finding of the court; and we have no doubt whatever but that had the court seen fit to make a special finding that Weston did not bring nor authorize the bringing of this suit, that such special finding would have abundant support from the evidence in the record. It is not necessary to quote this evidence, but it establishes the fact that Weston did not bring nor authorize the bringing of this action. He did not employ or pay counsel who brought it. The suit appears to be a speculative one insti-

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tuted by a real estate agent of Nebraska City. The district court also found specially that there was no equity in the petition filed in this case, and we think the district court was right in this finding. It will be observed that this is a petition in equity in which it is alleged that appellant owns certain real estate; that this real estate is in the possession of the appellees, who claim an adverse title or interest therein; that the interest and claim of appellees are based in part upon a sale of real estate for the taxes for the year 1879, and a tax deed issued in pursuance of such sale. The allegation in the petition that "the premises were not properly assessed for taxes and that there was no legal and sufficient levy of taxes for said year" is a mere conclusion. The petition sufficiently shows that a tax was levied upon this real estate for public purposes, and having been levied it became, by virtue of the law, a lien on the real estate until paid or until barred by the statute. The sale made of this real estate for the taxes for the year 1879 may have been and probably was invalid, and the deed may have been and probably was void; but the purchaser of this real estate at such tax sale, although the same was an invalid one, became subrogated to the rights of the public by his purchase, and that right, as already seen, was a lien upon the real estate for the amount of the taxes paid until paid or barred. The petition in this case does not offer to pay the taxes paid at this sale or subsequently. On the contrary, the prayer is that the tax levy, the sale, and the deed may all be decreed void, and the title and possession of the premises may be decreed to be in the appellant, free from any lien for any such taxes.

In *Loney v. Courtney*, 24 Neb., 580, Loney had executed a mortgage upon certain real estate. There had been a foreclosure, or attempted foreclosure, of this mortgage, a sale of the real estate, and a sheriff's deed executed in pursuance of such foreclosure and sale. For reasons not necessary to set out here, the proceedings and the decree fore-

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closing this mortgage were void. Loney then brought his action in equity to cancel the deed made by the sheriff as a cloud upon his title, and in the petition he made no offer to pay what was equitably due the parties made defendants upon the mortgage. The court below entered a decree in favor of Loney canceling the sheriff's deed. On appeal this court said: "In the case under consideration the mortgage was given to secure a *bona fide* debt. This debt, to the extent of the purchase price of the land, under the decree, has not been paid, if the deed in question is declared void. The plaintiff, however, ignores this demand. He makes no offer to pay what is equitably due the defendants upon the mortgage, and therefore is asking for equitable relief without offering to do equity." And the decree of the district court was reversed. To the same effect see *Morrison v. Hershire*, 32 Ia., 271.

If the appellant was the owner of the legal title to the premises in controversy and entitled to their possession, he had the right to put his title on trial before a law judge and a jury; but when he invokes the court for equitable relief he must offer himself to do equity; and since he did not offer in the petition to pay to the appellees whatever sum the court might find they had paid out in the purchasing of these premises at the tax sale made thereof for taxes which were a lien on the premises and taxes subsequently paid that were a lien upon said premises, the petition stated no ground for equitable relief and the decree of the district court was correct. Its judgment is accordingly

AFFIRMED.

SARAH DISHER V. PETER DISHER ET AL.

FILED MAY 21, 1895. No. 5172.

1. **Waste: INJUNCTION.** Although the rule of the common law in relation to waste has been greatly relaxed in favor of the tenant, the preventive jurisdiction of courts of equity by means of injunction is still freely exercised in favor of the reversioner against a tenant in possession, whenever the threatened acts amount to a manifest injury to the estate and a wanton abuse of the tenant's rights.
2. ———: **RIGHTS OF LIFE TENANT.** It is not waste for a life tenant to remove timber so as to fit the land for pasture or cultivation, provided he does not in so doing damage or diminish the value of the inheritance, and his acts are conformable to the rules of good husbandry. (*Wilkinson v. Wilkinson*, 59 Wis., 557.)
3. ———: **INJUNCTION AGAINST LIFE TENANT: EVIDENCE.** Evidence examined, and *held* to sustain the allegation of waste by the reversioners against the defendant, a tenant for life.
4. **Equity: EXERCISE OF JURISDICTION: PRACTICE.** When a court of equity has acquired jurisdiction of a cause for any purpose, it may retain it for all purposes, and proceed to a determination of all of the matters put in issue by the pleadings. (*Morrissey v. Broomal*, 37 Neb., 766.)
5. **Estrepement: INJUNCTION: DAMAGES.** Under our system, the reversioner in an action to stay threatened waste by a tenant for life may recover for waste previously committed, provided there be some connection between the injury done and the acts threatened.
6. **Estates: PAYMENT OF TAXES.** As between a tenant for life and the reversioner the former is required to pay taxes assessed against the estate.
7. ———: **WASTE: DAMAGES: COUNTER-CLAIM.** Finding against the defendant on the cause of action alleged in her counter-claim *held* sustained by the evidence.

ERROR from the district court of Gage county. Tried below before BROADY, J.

J. C. Johnston, for plaintiff in error.

George A. Murphy, *contra*.

POST, J.

This is a petition in error and presents for review a decree of the district court of Gage county in a proceeding in which the defendants in error were plaintiffs and the plaintiff in error was defendant, to restrain the commission of threatened waste by the defendant therein as tenant for life, and to recover for damage to the plaintiffs' estate on account of waste previously committed. From the petition, which was filed March 6, 1891, it appears that Stephen T. Disher died intestate on the 22d day of March, 1884, leaving no issue, and that the plaintiffs, his brothers and sisters, and children of deceased brothers and sisters, are his heirs at law; that deceased was at the time of his death the owner of 560 acres of land in Gage county, which under the laws of this state descended to the plaintiffs, subject to the life estate therein of the defendant Sarah Disher, widow of said deceased; that the defendant has remained in possession of said property since the death of the said Stephen T. Disher, receiving the rents and profits therefrom; that said property is rendered valuable by reason of growing timber upon a portion thereof (which is by witnesses described as the home place); that on or about January 1, 1891, the defendant, without authority or license from plaintiffs, cut down and converted into cord wood for the purpose of sale a large quantity of the most valuable timber growing upon said premises, to-wit, 250 cords of four-foot wood; that she has contracted to sell 300 cords of four-foot wood and 100 cords of two-foot wood to be cut from said premises, and is now cutting and threatening to cut and carry away all of the valuable timber upon said premises, and which is especially valuable to said

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land as a shelter to stock as well as the keeping in repair of the fences and other improvements thereon. It is further alleged that the defendant, on or about January 1, 1891, wrongfully removed from said premises a dwelling house situated thereon, of the value of \$260, to property of her own, and is threatening to remove other buildings from said premises. The defendant in her answer, after a general denial of the allegations of the petition, admits the cutting of certain timber growing upon said premises, but which she charges was by way of improvement thereof and for the betterment of plaintiff's estate, and which does not, she alleges, constitute waste. She admits the wood cut by her amounted to 240 cords, of the value of \$2 per cord, and which it was her purpose to sell in order to reimburse herself on account of money paid out for taxes, and labor in keeping said place in repair, in excess of the rents received therefrom. She admits the removal of the dwelling house mentioned in the petition, but denies that it was of any value, or that her act in that regard constituted waste for which she is accountable in this proceeding. For a counter-claim she alleges that plaintiffs are indebted to her in the sum of \$1,400 and interest for money advanced to the administrator of the estate of her said husband, and which was used for the purpose of paying and discharging a mortgage of \$700 on the lands mentioned, and a further mortgage of \$700 which said deceased had during his lifetime assumed and agreed to pay. The reply is (1) a general denial, (2) an allegation that the cause of action mentioned in the counter-claim did not accrue within four years. There was a general finding for the plaintiffs, their damage being assessed at \$200, for which judgment was allowed, accompanied by a decree prohibiting the further removal of buildings from said premises, also the further cutting or removing of the growing timber except for firewood and for repairs and improvements thereon.

The first assignment of error to which we will give attention is the denial by the district court of a trial by jury on demand of the defendant, and which presents the question of the jurisdiction of a court of equity over the cause of action alleged. It cannot be denied that the doctrine of the common law in relation to waste has been greatly relaxed in favor of the tenant. But the preventive jurisdiction of courts of equity by means of injunction is still freely exercised in order to protect the reversioner against waste by the tenant in possession when the threatened acts amount to a manifest injury to the inheritance and a wanton abuse of the tenant's rights. (2 Story, Equity Jurisprudence, sec. 915; High, Injunctions, sec. 432 *et seq.*; Wood, Landlord & Tenant, sec. 54; 4 Kent, Commentaries, 76 *et seq.*; 3 Pomeroy, Equity Jurisprudence, sec. 1348.) The doctrine above stated is recognized in many reported cases, and is so well established as to be regarded elementary law. The objection we are discussing, it should be remembered, was to the allegations of the petition. It must, therefore, for the purpose of the present inquiry, be regarded as a general demurrer and not presenting the sufficiency of the evidence to sustain the finding of the court,—a question which will be noticed under another assignment. The allegations that the land in this case is valued chiefly on account of the growing timber thereon, which is especially suitable as shelter for live stock, and that the defendant is cutting and threatening to cut and carry away all of the valuable timber thereon, and that she has removed therefrom a dwelling house and threatens to remove other buildings, certainly present a case for equitable cognizance. It is, however, urged that where the pleadings present both legal and equitable issues the parties will be entitled to submit them to a jury, provided demand therefor be made at the proper time. But this court, in *Morrissey v. Broomal*, 37 Neb, 766, recognized as sound the opposing view, and held that when a court of

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equity has acquired jurisdiction over a cause for any purpose it may retain it for all purposes and proceed to a determination of all matters put in issue by the pleadings. And whatever may be the rule at common law, we have no doubt that under our system the reversioner in an action to stay threatened waste by a tenant for life may compel the latter to account for waste previously committed, provided there be some connection between the injury done and that threatened. (Bliss, Code Pleading, 211; *Rodgers v. Rodgers*, 11 Barb. [N. Y.], 595.)

We find in the several briefs submitted herein an exhaustive discussion of the rights of a tenant for life as against the reversioner with respect to growing timber upon the demised premises, but an examination of the many cases cited by counsel would result in an unnecessary prolonging of this opinion without corresponding profit. It is sufficient that we are constrained to adopt the rule asserted by Judge Cassoday, whose views upon this and kindred subjects are entitled to especial consideration, viz., that it is not waste for a life tenant to cut wood or timber so as to fit the land for pasture or cultivation, provided he does not, in so doing, damage or diminish the value of the inheritance, and his acts are conformable to the rules of good husbandry, although the wood and timber so cut be sold or consumed off the premises (see *Wilkinson v. Wilkinson*, 59 Wis., 557); and that view, which was evidently adopted by the district court, is in substantial accord with the authorities cited as bearing upon the jurisdiction of equity in like cases. Applying that rule to the facts of this case we have no difficulty in holding with the district court, that the acts threatened, as well as those committed, constitute equitable waste. Indeed, the natural and only inference is that the cutting of the timber is a manifest injury to the inheritance and a wanton abuse of the defendant's rights. It is shown by the evidence of plaintiffs' witnesses, and not disputed, that the reason assigned by the

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defendant for the cutting of the timber was that she wanted to turn the wood into cash in order to make payment on certain land which she had purchased in her own right. The witnesses practically agree in the opinion that the value of the land has been materially diminished by reason of the removal of the timber and the consequent destruction of the shelter and protection which it afforded to stock, thus rendering the premises less desirable for the purpose of stock raising. The finding upon the merits of the plaintiffs' cause is clearly right and will not be disturbed. The claim that defendant was required to sell the growing timber to provide funds for payment of current taxes cannot be sustained for reasons already stated, and for the further reason that as between herself and these plaintiffs it was her duty to pay the taxes. (Wood, Landlord & Tenant, sec. 54, and cases cited in note.) Nor does the counter-claim for money advanced to the administrator merit serious consideration, for the reason, among others, that the mortgages mentioned by the defendant are not shown to have been paid with money furnished by her, while, on the other hand, the irresistible inference from the evidence is that they were paid and satisfied with the proceeds of the personal property of the deceased, Stephen T. Disher. There being no error in the record the judgment of the district court will be

AFFIRMED.

FRANK H. STOPPERT V. ELIZABETH NIERLE.

FILED MAY 21, 1895. NO. 6438.

1. **Bastardy Proceedings: JURISDICTION OF COUNTY JUDGE.**
Proceedings under chapter 37, Compiled Statutes, entitled "Illegitimate Children," are within the jurisdiction of a county judge and may be instituted and hearing had before such judge.

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2. —: EXAMINATION BEFORE JUSTICE OF THE PEACE. Errors committed by a justice of the peace or county judge in excluding testimony during the examination of the complainant in a bastardy case will not affect the jurisdiction of the district court.
3. **Bastardy: TRIAL.** An action under the provisions of our statute in relation to "Illegitimate Children" is, in its nature, a civil proceeding, and the rules governing such proceedings apply to it, and each party is entitled to but three peremptory challenges to jurors.
4. **Continuance: REVIEW.** Motions for change of venue and for continuance are addressed to the sound discretion of the trial court, and unless it appears that there has been an abuse of such discretion, its rulings thereon will not be disturbed.
5. **Bastardy: CHARACTER OF DEFENDANT: EVIDENCE.** The character and reputation of the defendant for chastity and virtue is not an issue in an action of bastardy; and notwithstanding proof of the facts of his having sexual connection with the complainant and of his being the father of her child may affect his reputation for chastity, he cannot invoke the aid of his previous reputation in that respect as tending to disprove such facts.
6. **Statutes: CONSTRUCTION.** Where the words of a statute are plain, direct, and unambiguous, no interpretation is needed to ascertain their meaning; a mere reading will suffice.
7. **Bastardy: TRIAL: EVIDENCE.** The portion of section 5, chapter 37, Compiled Statutes, entitled "Illegitimate Children," in which appears the statement, "And at the trial of such issue the examination before the justice shall be given in evidence," authorizes the offer and introduction in evidence by either party during trial in the district court of the examination of complainant in an action of bastardy, taken before a justice of the peace or county judge.
8. **Trial: CREDIBILITY OF WITNESS: INSTRUCTION.** An instruction worded as follows: "It is a fundamental principle of law and evidence that if a witness is found to have sworn falsely upon one material point, such witness should be presumed to have testified falsely on every other material point. If you find the plaintiff has testified falsely on one matter material to her case, you are at liberty to disregard her entire testimony for that reason alone,"—was requested to be given by plaintiff in error and the request refused by the trial court. *Held*, Not error, for the reason that the instruction was defective and erroneous, in that its statements in relation to a witness or the plaintiff swear-

ing falsely were not qualified by the words "willfully" or "intentionally," or others of like import, and did not correctly express the rule invoked of *Falsus in uno, falsus in omnibus*.

9. **Assignments of Error: INSTRUCTIONS.** Errors assigned in a group with reference to the giving or refusal to give instructions will be examined no further than is necessary to ascertain that one of the instructions given was correct, or one refused properly rejected.
10. **Bastardy: WITNESSES: EVIDENCE.** In an action of bastardy the defendant is entitled to ask the complainant during cross-examination whether she had sexual connection with other men at or near the time the child was begotten, and to have such questions answered; and it is error to restrict the range of such cross-examination to a number of days less than the period of gestation, especially so when, as in the case at bar, the time excluded by the restriction is the ten days or two weeks immediately prior to the date when the complainant has testified she had the first act of sexual intercourse with defendant, and also within the period of gestation.
11. **Rulings on Evidence: REVIEW: ASSIGNMENTS OF ERROR.** This court will not review the rulings of a trial court admitting testimony unless the particular rulings claimed to be erroneous are definitely pointed out in the allegations of the petition in error.
12. **Bastardy: EVIDENCE.** Evidence of declarations of the complainant in a bastardy suit, in which she claimed the defendant was the father of her child, made during ordinary conversations or out of court and not during her testimony before the justice or county judge or the district court, is incompetent and inadmissible.
12. —: **CHARACTER OF PROCEEDINGS: STATUTES.** The purposes of a bastardy proceeding are to compel the father of the child to assist the mother in its support and maintenance and to indemnify the county against its becoming a public charge, and the portion of section 1, chapter 37, Compiled Statutes, 1893, in which it is provided that the party accused and the complainant may make a settlement, in so far as the relief sought is for her assistance and benefit, is but an incident to such object of the law, and is expressed in the title of the act for the maintenance and support of illegitimate children, approved February 25, 1875. (For act see Session Laws, 1875, p. 53.)

ERROR from the district court for Cedar county. Tried below before NORRIS, J.

Wilbur F. Bryant, for plaintiff in error.

Gooding & Weed, contra.

HARRISON, J.

On the 12th day of July, 1892, the defendant in error filed a complaint with the county judge of Cedar county, in which she charged the plaintiff in error with the paternity of her unborn bastard child. A warrant was issued and the plaintiff in error was arrested and brought before the county judge, and on hearing was held to appear before the district court to answer the charge. During the next term of the district court in Cedar county, after some preliminary matters (which will be noticed in their order in so far as objected to and properly assigned as error) had been presented and disposition made of them, the case was tried before the court and a jury and the defendant pronounced guilty by the jury in their verdict, and, after motion for new trial was heard and overruled, adjudged by the court to pay to the complainant the sum of \$150 and the further sums of \$10 per month until the child should be ten years of age, and the costs, with the further requirement that he give a bond in the sum of \$1,200 to secure the performance of the judgment and order of the court, and if such bond was not given, to be committed to jail, etc. To reverse this judgment the case has been brought by proceedings in error to this court.

The first assignment of error in plaintiff's brief is that the court erred in overruling a motion to strike the case from the files,—by which we presume was meant to dismiss it, as that would have been the effect of an order sustaining the motion,—on the ground that the preliminary examination was before the county judge, and that a county

judge has no jurisdiction of a complaint in an action for bastardy. The question of the jurisdiction of a county judge in such a proceeding as this was presented to this court in *Ingram v. State*, 24 Neb., 33, and in the opinion then written it was held: "The county judge has jurisdiction to hear proceedings instituted under chapter 37 of Compiled Statutes, entitled 'Illegitimate Children,'" and we are satisfied with the conclusion reached at that time and will adhere to it.

It is further urged that the trial court should not have admitted in evidence the testimony of the complainant given at the preliminary hearing before the county judge, for two reasons: First, the testimony of the complainant taken at the preliminary hearing can be used by the defendant, but not introduced in behalf of the complainant; second, the county judge erred in sustaining objections to questions propounded to complainant for defendant during the hearing. With reference to the second of the above reasons it will suffice to say that the question raised was presented to this court in the case of *Altschuler v. Algaza*, 16 Neb., 631, the error assigned being, as in the case at bar, that to questions asked the complainant during her cross-examination, at the time she instituted her action before the justice of the peace, objections were made and sustained and the evidence sought to be elicited thus excluded, and it was then said that errors committed by the justice of the peace or examining magistrate in the exclusion of testimony during the examination of the complainant do not affect the jurisdiction of the district court. The first of the reasons as above stated in regard to the admission of the evidence taken at the examination before the county judge we will pass for the present and revert to it hereafter.

It is further assigned as error that the defendant was allowed but three peremptory challenges. The rule in regard to the number of peremptory challenges to which

either party is entitled in a case like the one at bar was announced by this court in *Kremling v. Lallman*, 16 Neb., 280, where it was stated that three was the correct number. We are satisfied with the conclusion reached in that case and the rule established.

It is contended that the trial court erred in overruling the defendant's motion for a change of venue. There were some affidavits filed in support of this motion and also some in opposition, and after an examination of them we do not feel warranted in saying that the trial court was wrong in concluding that the defendant could have a fair and impartial trial in the county where the action was pending, and it was not error to overrule the motion. (*Northeastern Nebraska R. Co. v. Frazier*, 25 Neb., 43.) Such a motion is addressed to the sound discretion of the court, and unless it appears that there was an abuse of such discretion, its ruling upon the same will not be disturbed. (*Smith v. State*, 4 Neb., 277.) There was no unfair exercise of discretion by the trial court in its ruling upon the motion in this case for a change of venue; hence it is approved.

A motion for continuance was filed on behalf of defendant, which was denied by the court, and this action is assigned for error. The disposition of such an application is one which calls for the exercise of the discretionary power of the trial court, and if no abuse of such power appears, there is no error, and, as an examination of the record discloses to us no just cause for complaint in this respect, the action of the district court in denying the motion must be allowed to stand.

During the trial plaintiff in error called a witness to prove his reputation for virtue and chastity, and an objection interposed to the testimony was sustained by the court and the evidence excluded. The plaintiff in error made the offer to prove the facts to establish his reputation in the particulars stated and the court adhered to its former ruling.

The case on trial is in the nature of a civil action, and in such actions, where the reputation in any particular is not in issue and has no direct bearing upon the questions involved, evidence of it is not competent or material. Such testimony is not admissible in an action for damages for an assault or assault and battery. In an action for damages for the alleged willful and malicious setting fire to and burning some stacks of wheat belonging to plaintiff it was held that evidence of defendant's good character was not admissible. (*Barton v. Thompson*, 56 Ia., 571, 9 N. W. Rep., 899.) In such a case, no matter how serious a moral delinquency may be involved in a fact and how much the establishment of the fact may affect a party's reputation, he cannot invoke the aid of his previous reputation to disprove the fact. (*Smets v. Plunket*, 1 Strob. [S. Car.], 372. See, also, *Boick v. Bissell*, 45 N. W. Rep. [Mich.], 55; *Klien v. Bayer*, 45 N. W. Rep. [Mich.], 991; *Norris v. Stewart's Heirs*, 10 S. E. Rep. [N. Car.], 912; *Gough v. St. John*, 16 Wend. [N. Y.], 647.) Character is not in issue in bastardy proceedings. (*Houser v. State*, 93 Ind., 228.) The evidence of character offered by plaintiff in error was not admissible and the court did not err in excluding it.

We will now return to the assignment of error which we passed over, that the court was in error in allowing defendant in error to introduce the evidence taken during the examination before the county judge, the plaintiff in error having objected to such admission. It is claimed by plaintiff in error that the examination of complainant before the justice of the peace in an action of bastardy is directed by the law to be preserved and a transcript made of it and forwarded to the district court with the other papers for the benefit of the defendant in the action, and he may waive its use as evidence during the trial of the cause in the district court, and if he does so, it cannot be introduced by the other party to the action. We are cited

by counsel for plaintiff in error to the case of *Strickler v. Grass*, 32 Neb., 811, as supporting the above contention. There are some expressions used in the opinion in that case that lend some color to such a claim, but as we read the case cited it does not discuss or pass upon the point raised in the case at bar, but discusses and decides an entirely different question. This court has said in an action of bastardy (*Altschuler v. Algaza, supra*): "The evidence of the complainant on the preliminary examination, reduced to writing by the justice and transmitted to the district court, is for the purpose of confirming or impeaching her testimony in the latter court;" but it may be said that the statement last quoted, viewed as a precedent, is subject to the same infirmities as the case of *Strickler v. Grass, supra*, and probably it is open to the same objection. But be this as it may, in section 5, chapter 37, Compiled Statutes, under the statutory provisions of which this action was instituted, appears this sentence: "And at the trial of such issue the examination before the justice shall be given in evidence, and the mother of the bastard child shall be admitted as a competent witness, and her credibility be left to the jury," and the words used are plain and direct in their import and no interpretation of them is necessary to ascertain their meaning. The statement is that "the examination before the justice shall be given in evidence," and to us it clearly authorizes its use by either party and its reception when offered by either. In the case of *Hoff v. Fisher*, 26 O. St., 8, it was said (note that the words of the law as quoted are identical with those employed in our statute): "Section 9 of the bastardy act provides, 'and at the trial of such issues the examination before the justice shall be given in evidence and the mother of the bastard child shall be admitted as a competent witness.' Under this provision, either party may offer the written examination, and if it be lost, its contents may be proved." The trial court did not err in receiving in evidence the exami-

nation of the complainant before the county judge when offered for her.

It is further alleged as error that the trial court refused to give instruction numbered 3, requested by plaintiff in error. The instruction asked was as follows: "It is a fundamental principle of law and evidence that if a witness is found to have sworn falsely upon one material point, such witness should be presumed to have testified falsely on every other material point. If you find the defendant has testified falsely on one matter material to her case, you are at liberty to disregard her entire testimony for that reason alone." It will suffice to say, without further discussing this instruction, that it is too broad and sweeping, and also imperfect in its statement of the rule of law applicable to witnesses, in that it omits the requirement that the false swearing, if any, by the witness should be found to have been willfully or intentionally so. The maxim *Falsus in uno, falsus in omnibus* will only be applied in a case where a witness is shown to have willfully testified falsely to a fact within his knowledge. (*Buffalo County v. Van Sickel*, 16 Neb., 363; 2 Thompson, Trials, sec. 2423.)

Another assignment of error is as follows: "The court erred in instructing the jury as appears in paragraphs 1, 2, 3, 4, 5, 6, and 7 of the instructions of the court given on its own motion. The instruction numbered 1 was a statement by the court of the subject of the trial, and number 2 was in regard to the burden of proof resting upon the complainant, and we cannot discover wherein either of them was objectionable, and this being determined, we need not further consider this assignment, as the instructions to which exceptions were taken are grouped therein.

It is also alleged: "The court erred in instructing the jury as set out in paragraphs 1 and 2 of the additional instructions of the court given on its own motion." The first of the instructions referred to was not defective, hence we need not further consider the assignment, as it comes

within the rule just stated. One allegation of the petition in error is "that the court erred in refusing to allow this plaintiff (the defendant below) to cross-examine the prosecutrix as to her having had sexual intercourse with persons other than the plaintiff in error within the 300 days limit." The record of the portion of the cross-examination during which it is claimed the error assigned occurred discloses that the counsel for plaintiff in error asked the prosecutrix if she had had sexual intercourse with any other person than the defendant Frank H. Stoppert between the 17th of October, 1891, and the 31st day of the same month, and on objection to this question being sustained, asked substantially the same question, except the dates were changed to between the 25th day of October, 1891, and the 31st, and objection being sustained to this, the dates were changed to between the 28th day of October, 1891, and the 19th day of November, and the court sustained an objection on the ground that it called for evidence of acts outside of the period of gestation, or more than 300 days prior to the birth of the child. The court made this statement in sustaining the objection: "I think that is one day too much now according to my count." Prior to this he said in regard to limiting the cross-examination: "If it goes outside the period the objection will be sustained. Under the authority here I shall not allow you to go beyond the 300 days; the supreme court decision here says at the most 300 days." The question was again changed in regard to the dates, to between the 29th of October, 1891, and the 19th day of November, 1891, and the objection to it was then overruled. Counsel for plaintiff in error excepted to each of the adverse rulings. The testimony shows that the complainant gave birth to a child August 13, 1892, and she stated that plaintiff in error had sexual connection with her five times, three times in the field where they were husking corn and twice in the house of his parents with whom she was living; that the acts of intercourse all oc-

curred during the month of November, 1891, the first being on a day of the first part of the month and the others at times during the same month, the exact date of them she was unable to fix, but did state that one was soon after the 19th. The cross-examination of the prosecutrix then as to her intercourse with other men was restricted by the court to a period shorter than that of gestation. This was evidently the result of a wrong calculation in regard to time, as the statement had just been made that the questions might be directed to times within the 300 days and were almost immediately thereafter limited to a time some thirteen days less than indicated, the court, as we have quoted, giving the date beyond which he did not allow the cross-examination upon this point to extend, and as ascertained by its calculation. The plaintiff in error had a right to cross-examine the complainant and during cross-examination to ask her if she had had intercourse with any other men at or near the time the child was begotten, and to have her answer such questions (*Walker v. State*, 6 Blackf. [Ind.], 1; *Benham v. State*, 91 Ind., 82; *Ginn v. Commonwealth*, 5 Litt. [Ky.], 300; *United States v. Collins*, 1 Cranch C. C. [U. S.], 592), and it was error to deny him such right.

One of the allegations of the petition is "that the court erred in admitting in evidence declarations of the prosecutrix made out of court." This assignment of error is not sufficiently definite and specific to entitle the plaintiff in error to have it reviewed, and the error, if any, available for a reversal of the judgment. It does not state what declarations of prosecutrix were admitted in evidence, or on what subject, nor does it refer to any portion of the record in which the testimony with reference to her declarations will be found, nor by what witness the court allowed them to be detailed. (*Wonderlick v. Walker*, 41 Neb., 806; *Cortelyou v. Maben*, 40 Neb., 512; *Minick v. Huff*, 41 Neb., 516.) Under this assignment of error counsel for plaintiff in error argue that the action of the court by which it al-

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lowed Maggie Lammers and Chris Speth to give in evidence the statements made to them by prosecutrix before the birth of her child, in which she asserted that the plaintiff in error was its father, was erroneous, and we think it best to determine the question of the admissibility of such evidence. The declarations were statements made by a party to the action, in her own favor and tending to establish her case, and it is not necessary to cite authorities to the effect that, as a general rule, evidence of such statements is not admissible. In some of the states, in actions of bastardy, evidence of such declarations of the mother of the child in regard to its paternity, made at certain times designated, such as during the labor of child-birth, etc., are by statutory enactment made competent evidence, and in our state, as we have seen, the examination of the prosecutrix before the magistrate is made admissible by statutory rule; but under the general rules, and in the absence of statutory permission, evidence of statements of a party to an action in his or her own favor is not admissible in behalf of the party who made them, and are not so in bastardy cases. (*Richmond v. State*, 19 Wis., 326; *Walker v. State*, 6 Blackf. [Ind.], 1.)

There are some assignments of error which relate to the alleged misconduct of a juror in drinking some intoxicating liquor during the progress of the trial, and also alleged misconduct of counsel for prosecutrix during the trial or while making a statement of the case. If there should be another trial, these are matters which would probably not appear again or be drawn in question, and not being necessarily involved in reaching a decision in the case at the present time, we will not discuss them.

It is urged that the verdict is not sustained by sufficient evidence. As a consideration of this would necessitate more or less comment upon the evidence, and as there must be a new trial, we think it best not to enter into a discussion of the weight and sufficiency of the testimony. This

case was submitted October 24, 1893. November 12, 1894, plaintiff in error filed an amended petition in error, and on December 26, 1894, his counsel filed a brief in which it is argued that the act under the provisions of which this action was instituted is unconstitutional. It is contended that the subject-matter of the section of the act wherein it is stated: "If, on such examination, the party accused shall pay or secure to be paid to the complainant such sum or sums of money or property as she may agree to receive in full satisfaction, and shall further give bonds to the county commissioners of the county in which said complainant shall reside and their successors in office, conditioned to save such county free from all charges toward the maintenance of said child, then and in that case the justice shall discharge the party accused out of custody, or [on] his paying the costs of prosecution," (see sec. 1, ch. 37, Compiled Statutes, 1893), inasmuch as it provides for a settlement by the accused person with the complainant, is not expressed in the title of the act, and renders it unconstitutional, as violative of section 11, article 3, of the constitution, which is as follows: "No bill shall contain more than one subject, and the same shall be clearly expressed in its title." In this argument we think counsel for plaintiff in error is clearly wrong. The title to the act in question reads: "An act for the maintenance and support of illegitimate children." (See Session Laws, 1875, p. 53.) The evident object of the legislation embraced in the act is to make the moral obligation of the father to assist in the support and maintenance of his child a legal one, and operative in favor and for the benefit of both the mother and the county. "A proceeding under the bastardy act, while in the nature of a civil action, is properly a police regulation requiring the putative father to furnish support for his child and to indemnify the public against liability for its support." (*Ex parte Cottrell*, 13 Neb., 193.) "To compel him to assist in the maintenance of the fruit of his immoral act,

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and to indemnify the public against the burden of supporting the child, is the purpose of the proceeding in bastardy." (*In re Wheeler*, 34 Kan., 96; *Musser v. Stewart*, 21 O. St., 353.) The relief sought to be afforded by the law is twofold: to force the father to assist the mother in the support and maintenance of the child, and provide that it shall not become a county charge. It was entirely competent for the legislature to make provision for a settlement and satisfaction of this duty to the extent it affects the rights and is for the benefit of the mother. We can discover no objection to the accused and the complainant making such settlement either before or after the birth of the child, as it must be at either time a matter resting largely in calculation as to the time it will be necessary and the amount. It is but an incident to one of the main objects to be accomplished, viz., the assistance of the father in the support of his offspring, and as such is clearly and fully within the purview of the title of the act under the provisions of which the complainant commenced these proceedings.

There were no other points sufficiently raised by the allegations of the petition in error which we consider it advisable or necessary to discuss or determine now. The judgment of the district court will be reversed for the error committed in restricting the cross-examination of the prosecutrix on the subject, in the manner and to the extent hereinbefore indicated, and the case remanded.

REVERSED AND REMANDED.

GRAND ISLAND BANKING COMPANY, APPELLANT, v.
JAMES A. COSTELLO ET AL., APPELLEES.

FILED MAY 21, 1895. No. 6179.

1. **Garnishment of Mortgagee of Chattels: LEVY OF EXECUTION: ATTACHMENT.** By garnishment of a mortgagee in possession of mortgaged chattels such chattels are placed in custody of the law and thenceforward are no more subject to actual seizure and appropriation to the satisfaction of another execution or writ of attachment than if they had actually been levied upon when the garnishment took place.
2. **Chattel Mortgages: FRAUDULENT CONVEYANCES: GARNISHMENT.** The validity of a mortgagee's right to chattels held in his actual possession by virtue of his mortgage may be called in question by a garnishing creditor alleging and proving fraud, as well as by an actual levy on the chattels in defiance of the claims of such mortgagee.
3. **Executions: VALIDITY OF LEVY.** The test of the validity of a levy upon personal property is whether or not the acts of the officer under his writ have been such as would make him liable as trespasser but for the protection afforded by such writ.
4. **Chattel Mortgages: EXCESSIVE SECURITY: EVIDENCE: FRAUDULENT CONVEYANCES.** The disproportion, if one exists, between the value of chattels mortgaged and the amount thereby secured affords no basis for a presumption of law. It is a matter of evidence to be accorded such weight as in the light of surrounding circumstances it is entitled to receive in the determination of a question of fact.

APPEAL from the district court of Hall county. Heard below before HARRISON, J.

The opinion contains a statement of the case.

Abbott & Caldwell, for appellant:

The decree canceling appellant's mortgage should be set aside. The only lien on the mortgaged property superior to that of appellant is the claim for city and county taxes.

The mortgage is not invalid on the ground that the security is excessive. (*Grimes v. Farrington*, 19 Neb., 44; *Smith v. Boyer*, 35 Neb., 46; *Hershiser v. Higman*, 31 Neb., 531; *Whitney v. Levon*, 34 Neb., 443; *First Nat. Bank of Denver v. Lowrey*, 36 Neb., 291; *Thompson v. Richardson Drug Co.*, 33 Neb., 714; *Nelson v. Garey*, 15 Neb., 531; *Bierbower v. Polk*, 17 Neb., 268; *Davis v. Scott*, 22 Neb., 154; *Ward v. Parlin*, 30 Neb., 376; *Puckett v. Richardson Drug Co.*, 20 S. W. Rep. [Tex.], 1127; *Elwood v. May*, 24 Neb., 373; *Rothell v. Grimes*, 22 Neb., 526; *Leffel v. Schermerhorn*, 13 Neb., 342; *Shelley v. Heater*, 17 Neb., 505; *Downs v. Kissam*, 10 How. [U. S.], 102.)

After the appellant was garnished the property was in the custody of the law and not subject to execution or attachment. (*Northfield Knife Co. v. Shapleigh*, 24 Neb., 635; *Ryan v. Parris*, 48 Kan., 765.)

The following cases were cited as to priority of liens: *Chicago Lumber Co. v. Fisher*, 18 Neb., 334; *People v. Bristol*, 35 Mich., 28.

M. B. Reese, also for appellant:

The decisions that guided the court below in finding that appellant's mortgage was void have recently been overruled. (*Jones v. Loree*, 37 Neb., 816; *Kilpatrick v. McPheely*, 37 Neb., 800; *Farwell v. Wright*, 38 Neb., 445; *Kavanaugh v. Oberfelder*, 37 Neb., 647; *Costello v. Chamberlain*, 36 Neb., 45; *Whitney v. Levon*, 34 Neb., 443; *Sherwin v. Gaghagen*, 39 Neb., 238.)

Charles G. Ryan, for Hall county and other appellees:

The lien for taxes is superior to all others. (*Binkert v. Wabash R. Co.*, 98 Ill., 205; *Ream v. Stone*, 102 Ill., 359; *Kirkwood v. Magill*, 6 Kan., 540.)

The levies that were made, subject to appellant's mortgage, with consent of the mortgagee, were valid. (*Evans v.*

Warren, 122 Mass., 303; *Wisser v. O'Brien*, 44 How. Pr. [N. Y.], 209; *Nelson v. Ferris*, 30 Mich., 497.)

Charles B. Keller, for Wood, Brown & Co.:

The security taken by the appellant is excessive and the mortgage is therefore void. (*Thompson v. Richardson Drug Co.*, 33 Neb., 714; *Brown v. Work*, 30 Neb., 800; *Russell v. Lau*, 30 Neb., 209; *Bonns v. Carter*, 20 Neb., 566; *Morse v. Steinrod*, 29 Neb., 108; *White v. Cotzhausen*, 129 U. S., 343.)

The failure to register the mortgage made it fraudulent as to creditors. (*Simon v. Openheimer*, 20 Fed. Rep., 555; *Goll v. Miller*, 54 N. W. Rep. [Ia.], 443; *Steele v. Coon*, 27 Neb., 586; *Pond v. Skidmore*, 40 Conn., 213; *Standard Paper Co. v. Guenther*, 67 Wis., 101; *Sanger v. Freie Press Co.*, 41 N. W. Rep. [Wis.], 436; *Crippen v. Jacobson*, 56 Mich., 386; *Feary v. Cummings*, 41 Mich., 383; *Dyer v. Thornstead*, 29 N. W. Rep. [Minn.], 345.)

The creditors who levied subject to the mortgage are estopped from disputing its validity. (*Simon v. Openheimer*, 20 Fed. Rep., 555; *Russell v. Dudley*, 3 Met. [Mass.], 147; *Tolbert v. Horton*, 31 Minn., 518; *Howard v. Chase*, 104 Mass., 249; *Tuite v. Stevens*, 98 Mass., 305.)

As to what is necessary to constitute a levy see *Johnson v. Walker*, 23 Neb., 744; *Knap v. Sprague*, 9 Mass., 258; *Townsend v. Corning*, 40 O. St., 335; *Haggerty v. Wilber*, 16 Johns. [N. Y.], 287; *Lowry v. Coulter*, 9 Pa. St., 349; *Logsdon v. Spivey*, 54 Ill., 104; *Dresser v. Ainsworth*, 9 Barb. [N. Y.], 619; *Newman v. Hook*, 37 Mo., 207; *Duncan's Appeal*, 37 Pa. St., 500; *Standard Oil Co. v. Bretz*, 98 Ind., 231; *Westervelt v. Pinckney*, 14 Wend. [N. Y.], 123; *Bryan v. Bridge*, 6 Tex., 141; *Allen v. McCulla*, 25 Ia., 464; *Lane v. Jackson*, 5 Mass., 163; *Learned v. Vandeburgh*, 7 How Pr. [N. Y.], 379; *Dworak v. More*, 25 Neb., 739.

As to priority of liens the following cases were cited:

Loring v. Melendy, 11 O., 355; *Neal v. Foster*, 36 Fed. Rep., 29; *Smith v. Lind*, 29 Ill., 30.

Walter J. Lamb, for W. S. Peck & Co.:

A creditor may attack the title of the garnishee to property or effects of the debtor whenever the garnishee holds the same under a transfer fraudulent as to creditors. (*Blue Valley Bank v. Bane*, 20 Neb., 294; *Cowles v. Coe*, 21 Conn., 220; *Lamb v. Stone*, 11 Pick. [Mass.], 527; *Henry v. Murphy*, 54 Ala., 246; *Eyerman v. Kriekhaus*, 7 Mo. App., 455.)

The possession of property by the mortgagee under a mortgage of chattels after default, and the right he has over the goods, are utterly inconsistent with the possession of such goods at the same time by the sheriff under execution. (*McConnell v. Drnham*, 34 N. W. Rep. [Ia.], 298; *Chicago Lumber Co. v. Fisher*, 18 Neb., 334; *Townsend v. Corning*, 40 O. St., 335; *Rickards v. Cunningham*, 10 Neb., 417; *Chittenden v. Rougers*, 42 Ill., 105; *Sparks v. Compton*, 70 Ind., 393.)

All creditors who levied their attachments and executions subject to the bank mortgage recognized its validity, and until it was attacked by third parties were conclusively estopped from denying the validity of the mortgage, and so they are postponed to the levy by garnishment of W. S. Peck & Co. (*Kellogg v. Secord*, 3 N. W. Rep. [Mich.], 868; *Nelson v. Ferris*, 30 Mich., 499.)

When creditors pursue different remedies each is entitled to the precedence in law given under the remedy selected by him. (*Rockhill v. Hanna*, 15 How. [U. S.], 189.)

Fowler, Smith & Musgrave, for John V. Farwell & Co.:

The creditors who failed to attach or garnish are not in a position to assail the mortgage. After garnishment the property was *in custodia legis*. The creditors who attempted to levy execution, in violation of the rights of the mortgagee

and those who attached and garnished, acquired no lien on the property. (*Healey v. Butler*, 66 Wis., 9; *Luckland v. Garsch*, 56 Mo., 267; *Henry v. Murphy*, 54 Ala., 246; *Coble v. Nonemaker*, 78 Pa. St., 501; *Shaver Wagon & Carriage Co. v. Halsted*, 43 N. W. Rep. [Ia.], 623; *Johnson v. Hersey*, 73 Me., 291; *Morris v. House*, 32 Tex., 492; *Brainard v. Van Kuran*, 22 Ia., 261; *Sperry v. Gallaher*, 77 Ia., 107; *Strohm v. Hayes*, 70 Ill., 41; *First Nat. Bank of Stevens' Point v. Knowles*, 67 Wis., 373; *Cornish v. Russell*, 32 Neb., 297.)

Those who garnished have a valid lien. (*Northfield Knife Co. v. Shapleigh*, 24 Neb., 635.)

The equity in mortgaged chattels in possession of the mortgagee can only be reached by garnishment. (*Peckinbaugh v. Quillin*, 12 Neb., 586; *Brunham v. Doolittle*, 14 Neb., 214; *Chicago Lumber Co. v. Fisher*, 18 Neb., 338.)

W. H. Thompson, for Cushing, Olmstead & Snow and others, as to the effect of appellant's failure to file its mortgage, cited: *Hildreth v. Sands*, 2 Johns. Ch. [N. Y.], 35; *Hughes v. Cory*, 20 Ia., 399; *Blannerhassett v. Sherman*, 105 U. S., 100; *Walton v. First Nat. Bank*, 22 Pac. Rep. [Col.], 440; *Steele v. Coon*, 27 Neb., 597; *McQuade v. Roscerans*, 36 O. S., 442; *Russell v. Winne*, 37 N. Y., 593.

W. H. Platt, for Tootle, Hosea & Co.

Hall, McCulloch & English, for Steppacher, Arnold & Co.

R. R. Horth and *J. H. Woolley*, for other appellees.

RYAN, C.

This action was brought on February 11, 1891, in the district court of Hall county by the Grand Island Banking Company against James A. Costello, sheriff of said county, and the firms of Wood, Brown & Co. and Steppacher, Arnold & Co., to restrain the levy of an execution issued

on a judgment rendered in favor of each of the firms named against Charles A. Wiebe. The property consisting of a stock of dry goods, carpets, clothing, etc., was in the possession of the Grand Island Banking Company by its agent, J. W. Thompson, under a chattel mortgage previously made by Wiebe, the owner thereof, to said banking company. Prior to the attempted levies many suits had been begun against Wiebe, aided by attachments, under which the banking company had been garnished. There also had been commenced proceedings in aid of execution against Wiebe. By consent of the banking company there were alleged levies of executions in favor of various judgment creditors of Wiebe, made subject to the above chattel mortgage by J. W. Thompson aforesaid, claiming in making such levies to be acting in the capacity of deputy sheriff. The statements of appellant as to the number, description, and amounts of the processes which issued against Wiebe are not questioned, and therefore these descriptions will be accepted as correct for the purposes of this general statement, rather than to resort to an actual count, comparison, and computation for the purposes of accurate verification. The mortgage was made on February 4, possession thereunder was taken the next day, and before another day the mortgagee was garnished on claims to the amount of \$2,412.61, followed the next day by garnishments to the amount of \$4,063.38. There issued from the county court sixty-six executions for the collection of different sums, amounting in the aggregate to \$23,312.60. From the district court two attachments and garnishments issued for \$10,673.44. There issued from the county court three attachments and garnishments amounting to \$517.66, and four garnishments in aid of executions to the amount of \$3,863.55. The firm of Wood, Brown & Co. and the firm of Steppacher, Arnold & Co. on the 10th of February, 1891, notwithstanding existing garnishments of the mortgagee and the claims of existing levies expressly

subject to the mortgage, required an actual levy by seizure of certain mortgaged property to be made by the sheriff, which brought on this litigation. Subsequently every other creditor of Wiebe seems to have been made a party defendant, and thenceforward there were united efforts, under pleadings in the nature of cross-petitions, to set aside the mortgage above referred to, and, severally, each claimant sought to appropriate as large a proportion of the mortgaged property as possible. We are relieved of the necessity of passing upon the right to resort to these proceedings by a stipulation during the trial of the case in this language: "It is agreed between the parties to this suit that the entire controversy touching the property of Charles A. Wiebe, and the right of the parties thereto in this suit, shall be finally determined by the court in this action." (*Vide Sherwin v. Gaghagen*, 39 Neb., 238.) While this cause was pending in the district court the merchandise mortgaged was sold on foreclosure proceedings for \$23,700. There was on final hearing a decree which postponed the mortgage of the banking company to all claims except those of Wood, Brown & Co. and Steppacher, Arnold & Co. The garnishments were held entitled to priority over the several levies attempted upon the property described in the mortgage, and superior to the rights of all creditors was declared the right to collect the taxes due from Wiebe; and the banking company was required to distribute the proceeds of the foreclosure sale as above indicated.

1. On behalf of Wood, Brown & Co. and Steppacher, Arnold & Co., counsel for these two firms in argument say that on February 6, 1891, the stock mortgaged was in possession of the mortgagee; that the only attempts of the sheriff to levy had been, in terms, subject to the interest of the Grand Island Banking Company under its mortgage; that no actual seizure of any portion of the property was in fact made under any writ, the levy in each instance being simply indorsed as made in the manner above indi-

cated. The nature of the levies in favor of the two firms just indicated first became known to their attorneys on February 6, whereupon these attorneys, as they now state, recognizing that these levies were ineffectual and inadequate, being mere pen and ink levies, and an attempt to levy a writ upon a mere equity, upon demand indemnified the sheriff and demanded that he take manual possession of a sufficient amount of Wiebe's goods to satisfy the two aforesaid claims. This the sheriff was proceeding to do on February 10, when this suit was commenced to enjoin the making of such seizure and levy, as well as the removal of the property or interference with the possession or control of the bank over the same. As there had previously been several garnishments of the Grand Island Banking Company there are presented by the contentions of Wood, Brown & Co. and Steppacher, Arnold & Co. two questions, one of which is, the effect of the alleged levies previously made; the other, what rights had been acquired by garnishments of the banking company. It was held by the district court that illegality of the mortgage could be attacked by garnishing creditors of Wiebe by alleging and proving fraud, whether the writs of garnishment were issued on attachments or after judgment, and that a like attack might be instituted by a levy on the goods of an execution or attachment, if made regardless of the mortgage. It is important that there should be kept in remembrance the fact that the mortgagee was, at the time of all the occurrences now under consideration, in the actual, undisputed possession of the property sought to be affected. There were alleged levies thereon which consisted merely in minuting that such levies were made in each instance subject to the mortgage of the Grand Island Banking Company. One of the important rights of the banking company was the right to maintain undisturbed the possession which it then held. For making such an alleged levy the banking company could not maintain an action of any kind whatever

against the sheriff. The test of the validity of a levy upon personal property is whether or not the acts of the officer under his writ have been such as would make him liable as a trespasser but for the protection afforded by the writ. (*Westervelt v. Pinkney*, 14 Wend. [N. Y.], 123; *Bryan v. Bridge*, 6 Tex., 141; *Allen v. McCalla*, 25 Ia., 464.) It sometimes happens that while, in fact, a levy is invalid, an officer by his return may be estopped to deny its validity; but even this is not true in this instance. As against the alleged levies expressly subject to the mortgage of the Grand Island Banking Company in possession an actual levy of the writs in favor of Wood, Brown & Co. and Steppacher, Arnold & Co. would have created the better lien upon the property mortgaged. The alleged levies subject to the mortgage of the Grand Island Banking Company formed no basis for a contest with that company, for the return, which alone justified the attaching creditor's interference with the property, prohibited such interference as against rights conferred by the mortgage.

In this case the question of the most practical importance to Wood, Brown & Co. and Steppacher, Arnold & Co. is whether or not the existing garnishments of the Grand Island Banking Company conferred rights over which the levy of an attachment on behalf of either of said two firms could not prevail. In *Faulkner v. Meyers*, 6 Neb., 414, LAKE, C. J., said: "There were several instructions, requested by the plaintiffs in error, refused. These related to the right of an ordinary creditor by attachment to subject the interest of a mortgagor of goods and chattels in the hands of the mortgagee to the payment of his debt. As abstract propositions of law these instructions were in the main correct, but having no application to the case on trial were very properly refused. There is no doubt, however, that the equity of redemption in property so circumstanced may be reached by attachment. The plain orderly course to pursue in such case is by garnishment, whereby whatever

may remain of the mortgaged goods beyond that which shall be found necessary to satisfy the mortgage debt and interest and the costs of sale can be ordered paid over to the attachment creditor." In *Peckinbaugh v. Quillin*, 12 Neb., 586, LAKE, C. J., said: "The claim of the plaintiffs in error that the mortgagor had an interest in the mortgaged property subject to sale on execution, and, therefore attachable, cannot be sustained." In *Burnham v. Doolittle*, 14 Neb., 214, the holding in *Peckinbaugh v. Quillin* was qualified to the extent that it was held that the interest which a mortgagor of chattels might have in them might be reached by seizure under a writ of attachment at any time while in his possession, and by means of the process of garnishment if they had passed into the hands of the mortgagee. In *Chicago Lumber Co. v. Fisher*, 18 Neb., 334, REESE, J., said of the language used by LAKE, C. J., in the case of *Burnham v. Doolittle*, *supra*: "If by this language the learned judge intended to say that, under all circumstances, where property is in the possession of the mortgagor an execution or order of attachment may be levied upon the property itself and the property sold, the mortgagee being thus, in many instances, wholly deprived of his security, we cannot agree with him. But if he intended to say that the interest—*i. e.*, the equity of redemption—might be seized upon as an interest, then we should not differ, perhaps." In the cases thus far reviewed there was considered only the proper method of procedure where there existed no intention to question the validity of the mortgage under which the garnishee was in possession. In *Reed v. Fletcher*, 24 Neb., 435, COBB, J., used this language: "Drake, in his valuable work on Attachments at section 251, sixth edition, says: 'So it has been held that garnishment has the effect to place the property in the garnishee's hands in the custody of the law, and that an officer has no right after the garnishment to take the property from the garnishee.' To this he cites three cases. The two first fully sustain the text; the third,

being out of the library, has not been examined." The volume referred to as being out of the library has been returned, and an examination of the third case cited by Drake is found to be equally in point with the other two. In *Northfield Knife Co. v. Shapleigh*, 24 Neb., 635, the case of *Reed v. Fletcher*, *supra*, was cited with approval, and it was furthermore held, if necessary to render effectual the garnishment, that a receiver would be appointed. It may now be accepted as being without question the law of this state, that, by garnishment of a mortgagee in possession of chattels mortgaged, such chattels are placed *in custodia legis*, and that thenceforward the possession of the garnishee cannot be interfered with by a direct levy of an execution or writ of attachment upon the property in the hands of the garnishee so as to postpone the rights of the party in whose favor the garnishment had been made. As between the attachment and execution creditors who secured garnishments on the one hand, and the firms of Wood, Brown & Co. and Steppacher, Arnold & Co. and such creditors of Wiebe as procured levies subject to the interest of the Grand Island Banking Company on the other hand, the decree of the district court must stand.

2. The attachment and execution plaintiffs in whose suits against Wiebe the Grand Island Banking Company had been garnished, by their pleadings attacked the mortgage under which the agent of the Grand Island Banking Company held possession, as fraudulent in respect to creditors of the mortgagor. On the 15th day of January, 1891, Mr. Wiebe, already owing the Grand Island Banking Company about \$12,000, borrowed of it \$3,000 more. In the forenoon of February 4, following the above date, Mr. Wiebe called on the cashier of the banking company and urgently requested an additional loan of \$5,000. In this interview it was developed that Mr. Wiebe's assets were of the value of \$15,000 less than his estimate of January 15 preceding, while his liabilities were in the neighborhood of

\$15,000 in excess of that estimate. The only outcome of this conference with the cashier was that Mr. Wiebe was requested to meet the officers of the banking company at its office at 7 o'clock in the evening of the same day, when Mr. Abbott, its vice president and attorney, then out of the city, would be present. The proposed meeting took place at the time and place designated, the representatives of the banking company thereat being George B. Bell, cashier, and George A. Packer, O. A. Abbott, J. W. Thompson, and W. B. Carey, directors. The president, Mr. Peterson, was a non-resident of this state and was absent. Mr. Wiebe was accompanied by W. B. Coggeshall, who, in his testimony, described himself as then being practical manager under Mr. Wiebe. It is impossible to state what transpired at this conference in the order of its occurrence, though we might adopt the narrative of some particular witness. The events will therefore be described without special reference to their order of sequence. At first, the request for an additional loan was presented to the officers of the banking company and refused. Mr. Coggeshall, then addressing Mr. Abbott, inquired if Mr. Wiebe could not sell the stock to him (Mr. Coggeshall), taking notes therefor, which Mr. Wiebe might indorse and turn out to his creditors and in that way get an extension, dispose of his store, and pay a hundred cents on the dollar. Mr. Abbott answered: "No, sir; that cannot be done." Mr. Abbott was then asked if a bill of sale could be made to the banking company—turning over everything to said company and allowing Mr. Wiebe to go ahead and close out his own property and pay a hundred cents on the dollar. To this Mr. Abbott answered as before, and, in further conversation, said that whatever the nature of the security might be, it must tell the truth on its face, so that any one who should see it would know the exact relations of the parties to it. The only proposition acceptable to the bank was formulated by Mr. Abbott, and that was that a chattel

mortgage should be made to the banking company upon the goods and fixtures, likewise that a mortgage should be made upon certain real property. To the question, "What would be done under the chattel mortgage if given?" the answer was, "Take possession at once and proceed to sell strictly according to law." Both Wiebe and Coggeshall objected to this course of procedure, because thereby, they said, not more than fifty per cent of the value of the goods would be realized. Previous to this conversation Mr. Coggeshall had stated that the stock footed up \$65,000, and that Mr. Wiebe owed about \$53,000, exclusive of one real estate mortgage of \$8,000 and another real estate mortgage of \$3,600. When the chattel mortgage was demanded with the explanation as to what would be done with it, both Mr. Wiebe and Mr. Coggeshall asserted that the stock would not, at forced sale, bring more than from \$15,000 to \$18,000. At some time while Mr. Wiebe was considering the only terms which Mr. Abbott would offer, Mr. Packer, one of the directors of the banking company, in the language of Mr. Coggeshall, "told how they treated a creditor of theirs in Troy. He said a fellow failed and they took possession of what he had, and that in ten days they had a compromise, and they had the fellow on his feet again." The language attributed to Mr. Packer by Mr. Coggeshall is quoted from the testimony, for, otherwise, its indefiniteness could not be fully realized. For a like reason the language of Mr. Coggeshall, which, it is argued, disclosed a fraudulent purpose on the part of the officers of the banking company in taking security, is reproduced from the bill of exceptions. Mr. Abbott was cross-examining, when the following interrogatories were propounded and answered:

Q. Now, then, what was said and who said it in reference to Mr. Wiebe's creditors—protecting Mr. Wiebe from his creditors?

A. Well, you know what you said.

Q. I want to know what was said. State what I said; that is what I want. If I said anything just state what it was.

A. Well, I have been stating it here.

Q. What was said about—you said that something was said in your direct examination in regard to helping Wiebe to a settlement with his creditors. Now, I want to know what was said and who said it; what the language was.

A. The plan was suggested by you.

Q. What was the plan that I suggested? What was my language?

A. The plan?

Q. Yes, sir.

A. That he should give a mortgage on everything that he had.

Q. For what purpose?

A. For what purpose?

Q. Yes, sir.

A. Well, to protect the bank first.

Q. Yes, sir, and what else?

A. Then to do what the other fellow—the other fellow could talk to him, not him to the other fellow.

Q. You say that I used that language?

A. I say that was the original plan of that deal.

Q. What I want to know now is what was said and who said it.

A. Who said it?

Q. Yes, and just what each man said.

A. The perfecting of that plan was by you.

Q. Well, just state what was said.

A. Well, I have stated it now as plain as it can be stated.

Q. Do you say that I said that—to protect the bank first and then to compel the creditors to come to Wiebe and not Wiebe to come to them?

A. In the general conversation I will make an affidavit—

Q. Never mind, you are on oath now. I simply asked

you a plain question whether I said those words or whether I did not?

A. Well, I will be responsible for what I say; that that meeting at the bank was for the purpose of seeing what could be done for Mr. Wiebe, and seeing if some arrangement could be provided whereby he could get an extension on his liabilities or perfect some plan whereby he could force a compromise. Now that is as plain as I can make it.

Q. Who suggested it? Where did you first hear it?

A. Where did I first hear it?

Q. Yes, sir.

A. Mr. Wiebe and I through the day consulted with the bank. Not only in the morning but in the afternoon. We consulted each other as regarded the condition of things and went there to the bank that night with the idea and with the intention of fixing some plan—I will reiterate what I have just said, whereby he could get an extension or make a compromise with his creditors.

Mr. Wiebe at the meeting of February 4 finally consented to execute to the bank the chattel mortgage and the real estate mortgage as demanded. There were then produced the existing evidences of indebtedness of Mr. Wiebe, together with an unrecorded real estate mortgage by him given to the banking company about two years before to secure such advances as should be made to him. Mr. Wiebe asked that this real estate mortgage might not be recorded, but that another should be taken in its stead because of certain reasons that he had for desiring this course to be taken. It appears that these reasons were that Mr. Wiebe had obtained credits on the faith of certain statements which ignored the existence of this mortgage rendered possible by the failure to record it. The notes of Wiebe in the bank on February 4 were three in number, one for \$10,000, dated January 30, 1891, due March 1, 1891; one for \$3,000, dated January 20, 1891, due March 1, 1891; and one for \$1,170, dated January 30, 1891, due

March 1, 1891. There was taken from Mr. Wiebe a note for \$15,792, of date February 4, 1891, payable to the banking company on demand, with ten per cent per annum interest from date, and the three above described notes were thereupon surrendered to him. Mr. Wiebe gave a chattel mortgage on his stock to secure this note, and he and his wife likewise made a real estate mortgage for the same purpose, and Wiebe then received the old unrecorded mortgage. When all this had been done Mr. Packer remarked that it was as clean a transaction as he ever saw in his whole life. After the mortgage had been given Mr. Wiebe started to leave the room, but immediately came back and said that he had two or three checks out, amounting to about \$100; that he owed his clerks some money and had no ready money with which to pay them, and asked that the banking company should pay the outstanding checks and honor those he would give to his clerks. The total amount necessary for these purposes he fixed at \$350, and he offered that when these payments were made to give his note for the amount, in respect to which certain notes amounting to the sum of \$5,700, held by the bank for collection, should be held as collateral. This proposition was assented to and afterwards the banking company paid out about \$456, instead of \$350, the amount in advance estimated as being necessary for the purposes indicated. The excess in collaterals over the above amount paid out was not claimed by the bank, but was held subject to such disposition as should be made of them by the district court. On the morning following the above meeting, possession was taken of mortgaged chattels by the banking company, which, until the foreclosure sale, maintained such possession, through its agent, J. W. Thompson, except as said possession was interfered with by the attempted hostile levies of Wood, Brown & Co. and Steppacher, Arnold & Co., hereinbefore mentioned. There was evidence introduced tending to show that very soon after February 4,

1891, probably the next day, Mr. Wiebe confessed judgment in the county court of Hall county in favor of the firm of Abbott & Caldwell for the sum of \$500, for services as attorneys at law to be rendered by that firm in the future in his behalf; that Mr. Abbott, of the above firm, who was the attorney who, on the night of February 4, had acted for the banking company as its vice president and counsel, advised Mr. Wiebe what course he should pursue with regard to certain debts he owed; that Mr. Wiebe afterwards had desk room in the office of Abbott & Caldwell; that Mr. Caldwell, Mr. Abbott's partner, advised Mr. Wiebe's collector to take but one or two accounts with him at one time, for fear he should be garnished on claims against Wiebe on some one of his collecting trips and otherwise counseled said collector; that immediately after the stock of Wiebe was taken into the possession of the banking company, Wiebe's creditors were clamorous for confessions of judgment, and that in respect to authorizing such judgments Mr. Abbott was Mr. Wiebe's legal adviser. One witness testified that while so acting Mr. Abbott, as Mr. Wiebe told witness, advised Mr. Wiebe not to confess judgment in favor of any outside creditor. This Mr. Abbott in his testimony denied having done. There was evidence of grave misconduct on the part of Mr. Wiebe, such as secreting his books, taking notes of customers dated anterior to February 4, 1891, etc. These acts, however, are not shown to have been known to, or countenanced by, any one connected with the banking company and hence, in any view, are immaterial as respects that company.

The evidence, aside from the disproportion alleged between the value of the goods and property mortgaged and the debt secured thereby, by which it is claimed that the existence of a fraudulent intent on the part of the mortgagee was established, has been fully set out, even to tediousness, that it may appear how unsatisfactory was this

part of this proof. There was due the banking company the full amount for which security was taken. There was no secret trust. As soon as practicable after the execution of the chattel mortgage possession thereunder was taken and thenceforward retained. The evidence of Mr. Coggeshall, while it intimated that there existed a secret purpose in making the mortgage, aside from securing the amount due from Mr. Wiebe, disclosed no fact or utterance showing that any of the officers of the banking company was aware of such purpose. It is probable that Mr. Wiebe and Mr. Coggeshall, after the fruitless application to the cashier for a further advance of \$5,000, in view of the conference which was appointed to be had in the evening, considered various plans which might be advantageous to Mr. Wiebe. This practically was what Mr. Coggeshall's testimony amounted to, and this theory is rendered probable by the promptness with which there was advanced at the meeting, first, a proposition that Wiebe should take Coggeshall's notes on long time for his stock, with the approval of the bank, followed, when rejected, by another proposition, which was that the banking company itself should purchase. Since each of these was declined, the banking company, so far as the evidence shows, was free from any participation in the plans or purposes of Mr. Wiebe and Mr. Coggeshall. Mr. Coggeshall's version of what was said by Mr. Packer, as has been already intimated, was not very clear. Mr. Coggeshall's exact language was:

The principal thing he said was—he told how they treated a creditor of theirs back in Troy.

Q. What did he say?

A. He said a fellow failed and they took possession of what he had, and that in ten days they had a compromise and they had the fellow on his feet again. That was the sum and substance of it.

Passing over the very evident misuse of the word "cred-

itor" for "debtor" Mr. Packer simply stated, in effect, that a man failed owing Mr. Packer and someone else, who took possession of what he had, and in ten days they had a compromise and the fellow on his feet again. In the first place this language does not seem specially to have been directed to Mr. Wiebe, and, if it was intended as an inducement to Wiebe, it was at variance with the straightforward, uncompromising terms proposed and exacted by Mr. Abbott, who, as all the witnesses concede, had charge of, and directed the transaction of, this business for the banking company. Mr. Wiebe was not sworn, and it was therefore not shown that he heard this statement of Mr. Packer. Of all the witnesses who testified as to the occurrences at this meeting, and there were six of them, Mr. Coggeshall was the only one who mentioned this language. It would therefore seem that it must not of necessity be conjectured that Mr. Wiebe heard it, since, apparently, it was addressed to no one in particular. The other remark of Mr. Packer, that that was as clean a transaction as he ever saw in his whole life, if accepted literally, was proof of the absence of fraud rather than its existence. The assumption that it was spoken ironically could be entertained only upon the hypothesis that the transaction was so obviously corrupt that therefrom the irony would be apparent. Whether or not corruption existed is the very question to be determined, hence this language does not aid our investigation. The existence of an unrecorded mortgage to secure advances to be made to Mr. Wiebe for two years previous to the date whereon the new mortgage was executed was an unusual circumstance. The failure to record an instrument of this kind impairs its operation to the extent prescribed in section 16, chapter 73, Compiled Statutes, which is in the following language:

"Sec. 16. All deeds, mortgages, and other instruments of writing which are required to be recorded, shall take effect and be in force from and after the time of delivering

the same to the register of deeds for record, and not before, as to all creditors and subsequent purchasers in good faith without notice; and all such deeds, mortgages, and other instruments shall be adjudged void as to all such creditors and subsequent purchasers without notice, whose deeds, mortgages, and other instruments shall be first recorded; *Provided*, That such deeds, mortgages, or instruments shall be valid between the parties."

The record of an instrument of the character above indicated is to impart notice of its existence. It might be that the withholding from record of a mortgage of real property would be so obviously part of a plan to deceive that greater force should be imputed to it than prescribed by the section just quoted. No such condition is, however, found in this case. It is true Mr. Wiebe's misrepresentations as to the unincumbered condition of his property were to some extent rendered plausible by the absence from the record of his mortgage. But this action was in no way founded upon such mortgage. The banking company was not aware, so far as the evidence shows, that Mr. Wiebe was making statements which ignored the existence of its mortgage. If it had been and nevertheless had taken no steps to correct the misinformation given by Mr. Wiebe in his efforts to establish his right to credit, the banking company might have been estopped, as against parties so deceived, from asserting its mortgage. But this would have been on the theory that the banking company was, in effect, a participant in the deception practiced. No case has come within our knowledge which holds that the mere failure to file a mortgage for record raises a presumption that such mortgage is void, and nothing short of this would sustain the contention of the appellees. It is quite possible that each member of the firm of Abbott & Caldwell may have manifested too much interest in the affairs of Mr. Wiebe after his store had been closed. In none of these transactions, however, did either of these gentlemen assume to

act for the banking company. They, as attorneys at law, accepted of business tendered by Mr. Wiebe, and, that they might be paid therefor, obtained his confession of judgment for prospective fees. They also acted for some of his creditors in obtaining judgment against him by confession, and thereon procured to be made certain so-called levies of executions subject to the mortgage of the banking company. Whatever of impropriety there may have been in any of these proceedings was chargeable individually to Messrs. Abbott & Caldwell, as attorneys at law, and was in no way imputable to the banking company, which was a corporation exclusively engaged in the business of banking.

From the unsubstantial character of the above evidence it is quite apparent that the finding that the chattel mortgage was invalid was based upon other facts than those above discussed. At the time of the entry of the decree in the district court (November 15, 1892) there had, within a comparatively recent time, been delivered by this court certain opinions which were generally understood to have established the doctrine that the mere fact that the value of the property mortgaged was in excess of the amount secured, with probable depreciations in value and such costs and outlays as must necessarily be expended in making collection from the security pledged, *ipso facto*, invalidated the mortgage. Doubtless this understanding of the doctrine established by this court was largely responsible for the finding adverse to the validity of Wiebe's chattel mortgage to the banking company. Mr. Coggeshall, a witness for the defendants, estimated the actual value of Mr. Wiebe's stock on February 4, 1891, at \$37,000. The invoice of date February 1, 1891, showed its value was \$43,000. Mr. Coggeshall's testimony was that it sold to the very best advantage as it was sold, and that \$23,700, the amount actually paid on foreclosure sale, was all that at such sale it could reasonably be expected to bring.

There was evidence that the value of the real property mortgaged contemporaneously with the chattels was \$8,000, so that, if this sum is added to the price for which the goods sold (\$23,700) the real and personal property actually mortgaged was of a value about double the amount thereby secured. Under these conditions the opinions in the cases of *Bonns v. Carter*, 22 Neb., 517, filed in the July term, 1887, *Morse v. Steinrod*, 29 Neb., 108, filed March 11, 1890, *Brown v. Work*, 30 Neb., 800, filed November 25, 1890, and *Thompson v. Richardson Drug Co.*, 33 Neb., 714, filed January 5, 1892, without doubt greatly conduced to the defeat of the banking company's mortgage in the district court. Of the above cases, *Bonns v. Carter* was expressly overruled in *Jones v. Loree*, 37 Neb., 816, filed October 4, 1893. The right of a debtor in good faith to prefer certain *bona fide* creditors to the exclusion of others, unless perhaps with the above exceptions, has been uniformly recognized by this court. (*Lininger v. Raymond*, 12 Neb., 19; *Grimes v. Farrington*, 19 Neb., 48; *Nelson v. Garey*, 15 Neb., 531; *Bierbower v. Polk*, 17 Neb., 268; *Costello v. Chamberlain*, 36 Neb., 45; *Kilpatrick-Koch Dry Goods Co. v. McPheely*, 37 Neb., 800; *Jones v. Loree*, 37 Neb., 816; *Farwell v. Wright*, 38 Neb., 445; *Kavanaugh v. Oberfelder*, 37 Neb., 649; *Sherwin v. Gaghagen*, 39 Neb., 238; *Hewitt v. Commercial Nat. Bank*, 40 Neb., 820.)

In the case of *Kilpatrick-Koch Dry Goods Co. v. McPheely*, *supra*, the following language was used: "We are not prepared to say that a mortgage would be fraudulent solely because the value of the property mortgaged was two or even three times greater than the debt. Whether it would be, would be a question of fact for a jury or trial court, and not a question of law. A debtor has a right to prefer his creditors; to pay part in full to the exclusion of others, and he has a right to secure the debts of a part of his creditors to the exclusion of the others; and this is true whether he be insolvent, or in failing circum-

stances, or not. All that the law requires of him is that he should act honestly; that his disposition of his property should not be made for the fraudulent purpose of hindering, delaying, or defrauding his creditors; and whether an act of a debtor in the disposition of his property was fraudulent, is always a question of fact and not a question of law. Section 20, chapter 32, Compiled Statutes, provides: 'The question of a fraudulent intent * * * shall be deemed a question of fact and not of law.'

In an opinion prepared by IRVINE, C., in the case of *Kilpatrick-Koch Dry Goods Co. v. Bremers*, 44 Neb., 863, filed at this term, another phase of this question was under consideration, and the history of the decisions of this court in connection therewith were fully considered, closing with the following language: "If we should hold that the taking or giving of inadequate security constituted the transaction fraudulent, we would practically hold that a debtor could never safely secure his creditor. The argument has always been the other way, and it has often been said that the giving and taking of security in value greatly in excess of the debt is evidence tending to prove fraud. It would not do to say that because a debtor cannot give adequate security he must refrain from giving any, or leave the transaction open to attack as constituting a fraud in law."

As was pointed out in *Kilpatrick-Koch Dry Goods Co. v. McPheely*, *supra*, the statute of this state therein referred to provides that the question of fraudulent intent shall be deemed a question of fact and not of law. This statutory provision directly negatives the proposition that from the taking of security in excess of the amount to be secured the law implies a fraudulent intent. As pointed out by Commissioner IRVINE, the disproportion, if one exists, is but a matter of evidence, to be given such consideration as in the light of surrounding circumstances it may be entitled to receive in determining a question of fact. We cannot believe that with this proposition considered as above indi-

cated there was sufficient evidence to sustain the finding that the chattel mortgage made by Mr. Wiebe to the Grand Island Banking Company was fraudulent or invalid. It follows as a consequence of this view that the costs and expenses of foreclosing plaintiff's chattel mortgage should be allowed, since they were provided for by the terms of the mortgage. There was evidence that this amount was \$883.85, but in the supplemental petition the amount was fixed at but \$866.35, which must control. We conclude, therefore, that, inferior only to the claim established for taxes, the Grand Island Banking Company is entitled to receive payment of the amount secured by its chattel mortgage at the date of the foreclosure sale, and the sum of \$866.35, expenses incidental to such foreclosure, and that after such payments have been deducted the remaining funds derived from said foreclosure sale, and the collateral notes and the collections therefrom made by said banking company, should be applied upon the claims of other creditors of Charles A. Wiebe in the same order of priority, between themselves, as was decreed in the district court, and that the Grand Island Banking Company should recover its costs. That a decree may be entered in this case conformably to the views above expressed the judgment of the district court is reversed.

REVERSED AND REMANDED.

HARRISON, J., not sitting.

CITIZENS NATIONAL BANK OF GRAND ISLAND V.
E. A. WEDGWOOD.

FILED MAY 21, 1895. No. 6151.

1. **Replevin: FINDINGS: VALUE OF PROPERTY.** Where, by a special finding on sufficient evidence, there was fixed the value of replevied property upon which the mortgage of the plaintiff was operative, a judgment rendered on a general verdict limited to the same amount will not be disturbed.
2. **Trial: SPECIAL FINDINGS: REVIEW.** A special finding will not be assumed to be in conflict with the general verdict of a jury, unless clearly so made to appear.
3. ———: ———: ———. A special finding, though clearly unsustained by the evidence, must be disregarded when the fact established by it is clearly irrelevant to the issues on trial.

ERROR from the district court of Hall county. Tried below before HARRISON, J.

Abbott & Caldwell, for plaintiff in error.

W. H. Thompson and *W. H. Platt*, *contra*.

RYAN, C.

This case was begun in the district court of Hall county by the Citizens National Bank for the recovery of possession of a stock of drugs, etc., claimed by virtue of a chattle mortgage executed by one Zimmer, the owner thereof, to C. Ipsen, by whom the notes and said mortgage were transferred to said bank. There was on the first trial a verdict in favor of the bank, whereby its special interest as mortgagee was fixed at \$1,137.25, and from a judgment upon said verdict error proceedings were prosecuted to this court. There was, thereupon, a reversal of the judgment of the district court, and it was held that a mortgage on goods created a specific lien upon the property mort-

gaged and none other. Another trial in the district court resulted in a special findings by the jury that the value of the goods replevied was \$1,526.10, and that the plaintiff was entitled to the possession of \$750. The difference between \$1,526.10 and \$750 was found in favor of the defendant in error, the sheriff of Hall county, whose interest therein was founded upon the levy of certain writs of attachment against one Heimberger, who had, since the making of the mortgage, become owner of the property in controversy.

The description in the mortgage was of an entire stock of drugs, etc., described as being in a drug store known as the Ipsen drug store. There was no provision evincing an intention to subject to the lien of the mortgage any goods or other article afterwards placed in the said stock, hence such accretions were not subject to said mortgage and this was what, in fact, was decided upon the former hearing in this court. To fix definite data upon which to establish the rights of the respective parties, the district court submitted to the jury special interrogatories, which were so answered as to enable this to be done. It is complained by the plaintiff in error, however, that certain of these interrogatories were answered in such a way as to afford no proper basis for the general verdict, besides being contradictory of each other. There were special findings to the effect that the stock replevied was in part the stock mortgaged, and that the interest of plaintiff in the stock was \$750. It is insisted that this last special finding was irreconcilable with still another, that the replevied stock comprised plush goods, etc., of the value of \$200 purchased after the execution of the bill of sale from Zimmer to Heimberger. The mortgage under which the Citizens National Bank claimed its rights was dated July 28, 1884, and was made by Mr. Zimmer, who executed the above mentioned bill of sale to Heimberger October 4, 1886. The interrogatory as to the plush goods purchased referred

to such time as had elapsed after the last mentioned date, and, therefore, of necessity excluded the interim between July 28, 1884, and October 4, 1886, a period of over two years. It is therefore very clear that by this special finding as to the purchase of plush goods, etc., there was nothing settled as to the amount in value of goods purchased by Zimmer before he sold out to Heimberger, consequently the exclusion from the operation of the mortgage of goods in excess of \$750 in value was not of necessity in conflict with the finding of purchases to the amount of \$200 in value. The special finding, therefore, that plaintiff's interest was but \$750, was contradictory of no other finding. It was in harmony with the general verdict and was not without the support of sufficient evidence to sustain it. It is quite clear that the face of the notes secured by mortgage held by plaintiff was \$950, irrespective of interest which had accumulated, consequently the special finding that there was due on said notes only \$750 was unsupported by the evidence. We do not, however, regard this as at all material, for this action was not for the recovery of a judgment against the maker for the amount of these notes. It was one for the possession of mortgaged property which plaintiff claimed as against the rights of parties on whose behalf levies of attachments had been made. As has already been pointed out, these rights were settled by the special findings of the jury, the mistake in respect to the amount due plaintiff from one not a party to the suit was therefore immaterial to the merits of the controversy. The judgment of the district court is

AFFIRMED.

HARRISON, J., not sitting.

Thompson v. Field.

SUSAN L. THOMPSON, APPELLEE, V. FREEMAN A. FIELD
ET AL., APPELLANTS.

FILED MAY 21, 1895. No. 6529.

Review. Findings of fact made by the district court upon conflicting evidence, on appeal will not be disturbed.

APPEAL from the district court of Buffalo county.
Heard below before HOLCOMB, J.

Dryden & Main, for appellants.

Gaslin, Newman & Hallowell, contra.

RYAN, C.

This action was brought for the foreclosure of a mortgage securing payment of a note for \$6,000, of date August 15, 1889, made by appellants to Charles O. Norton, by whom said note and mortgage were assigned to plaintiff. Two years before the date above given, Mr. Norton had loaned to a Mr. Wood the sum of \$3,000, at ten per cent interest per annum, for five years, secured by a mortgage upon the same property as described in the mortgage whereof a foreclosure was had herein. Subsequently, Mr. Wood sold the mortgaged property to Mr. Field, who, about August 15, 1889, had so improved it that it was deemed ample security for a larger loan. Mr. Field, being unable to borrow elsewhere the desired sum upon the property, applied to Mr. Norton, who at first refused, but afterwards consented to make a loan of \$6,000, taking the already mortgaged property as security. He would not, however, forego the advantage of a first-class loan having three years to run at ten per cent interest per annum without compensation, and between himself and Mr. Field it was arranged that in addition to payment of \$3,000 there

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should be paid Norton \$300 in consideration of his satisfaction of the existing mortgage. This was the explanation of the payment of \$300 made by both Mr. and Mrs. Norton, each of whom testified as from actual knowledge of the transaction. Mr. Field on the other hand testified that the sum of \$300 above referred to was exacted from him as advance interest on the \$6,000 borrowed, and if this was true, his defense of usury was without doubt established. The district court, however, found as a fact that there was no usury in the transaction, and it can hardly be contended that there was no evidence upon which this finding could be based. Under such circumstances the judgment of the district court cannot be disturbed. There was a contention that the transfer from Mr. Norton to plaintiff was such as would protect her, even though there existed a defense against the note in the hands of the original payee. We have not found it necessary to the determination of this case to consider this question, for, as has already been seen, there was no such defense established by the proofs. The judgment of the district court is

AFFIRMED.

BEATRICE RAPID TRANSIT & POWER COMPANY ET
AL. V. GERMAN NATIONAL BANK OF BEATRICE.

FILED MAY 21, 1895. No. 6227.

Verification of Pleading: CORPORATIONS. The fifth subdivision of section 120 of the Code of Civil Procedure authorizes the verification of pleadings for a corporation by its attorney at law as such, irrespective of the consideration that a summons might or might not legally be served upon such attorney.

ERROR from the district court of Gage county. Tried below before BUSH, J.

Beatrice Rapid Transit & Power Co. v. German Nat. Bank of Beatrice.

J. E. Cobbey, for plaintiff in error, cited: *Hershiser v. Delone*, 24 Neb., 382; *Speer v. Craig*, 16 Col., 478; *Tulloch v. Belleville Pump & Skein Works*, 31 Pac. Rep., [Col.] 229.

George A. Murphy, *contra*, cited: *Pottinger v. Garrison*, 3 Neb., 223; *Harral v. Gray*, 10 Neb., 188; *Dorrington v. Minnick*, 15 Neb., 400; *Buck v. Reed*, 27 Neb., 67.

RYAN, C.

The defendant in error obtained judgment in the district court of Gage county upon two causes of action stated in its petition, which was verified in the following language:

- “George A. Murphy, being first duly sworn, on oath deposes and says that he is the attorney for the plaintiff, which is a corporation; that he has read the foregoing petition and knows the contents thereof, and that the facts therein contained are true as he verily believes.” The district court overruled a motion to strike from the files the said petition for the reason assigned that it was not verified as required by law, and to compel plaintiff to verify its petition as by law required. No ground for the reversal of the judgment of the district court is argued except the alleged error of the district court in this ruling. It is provided by section 120 of the Code of Civil Procedure that the affidavit of verification “can be made by agent or attorney only: * * * Fifth—When the party is a corporation, in which case it may be made by the attorney, or any officer or agent upon whom a summons could be legally served.” It is contended by counsel for plaintiffs in error that the words “upon whom a summons could be legally served” should as well be held to qualify the word “attorney,” as officer or agent. It may be as argued, that the attorney as such is not more likely to know the facts of which he affirms the truth than would an officer or agent. This argument, if it has any force, should

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be addressed to the legislature. If plaintiff's construction of the above language as to authority to verify is sound, there could be no verification by an attorney at law as such. It could only be by such an attorney as the law provides shall be created for insurance companies by their powers of attorney. The obvious meaning of the fifth subdivision of section 120 of the Code of Civil Procedure is that verification of a pleading on behalf of corporations may be made by their attorneys at law, or by an officer or agent upon whom summons could be legally served, which latter class embraces such agents for the above purpose as are so constituted by power of attorney and are therefore called attorneys. The judgment of the district court is

AFFIRMED.

CITY OF BEATRICE V. ELLEN LEARY.

FILED MAY 21, 1895. No. 6303.

1. Surface Water: MUNICIPAL CORPORATIONS: NEGLIGENCE:

DAMAGES. The Big Blue river flows south through the city of Beatrice and crosses Court street at right angles. The plaintiff's property is situate on the north side of this street and west of the river. Mary and Scott streets are south of and parallel to Court street. Cedar street extends north and south and opens into Court street immediately south of the plaintiff's property. A draw, having its origin in the hills some miles southwest of plaintiff's property, meandered north and east to Cedar street, thence north to Court street, and there emptied into a ditch or drain extending down Court street to the river. This draw, in connection with the ditch in Court street, was a natural conduit through which the surface waters from rains and melting snows on a large area of country found their way to the Blue river. The city of Beatrice, on the petition of the plaintiff and other property owners, graded and paved said Court street and filled up the ditch therein, thus damming the draw in front of plaintiff's property. To carry off the waters that were accustomed

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to go down said draw the city built dikes across it at Scott and Mary streets and cut ditches down said streets from the draw to the river. During the heavy rains in the spring of 1892 the waters came down said draw to Court street, and being there obstructed by the filled ditch, overflowed the street and flowed on plaintiff's premises and damaged them. She sued the city, alleging that it had negligently omitted to provide suitable outlets for the waters that were accustomed to come down said draw after having filled the ditch in Court street, and that such negligence was the proximate cause of the damage to her property. *Held*, (1) That the evidence sustained the finding of the jury that the plaintiff's property was damaged by the overflowing waters which came down the draw to Court street and were unable to escape to the river by reason of the ditch in Court street being filled and the draw thereby obstructed; (2) that the overflow of the waters which damaged plaintiff's property was brought about by the act of the city in filling the ditch in Court street and failing to provide sufficient outlets down Mary and Scott streets or elsewhere to carry the waters from the draw into the river; (3) that such negligence on the part of the city was the proximate cause of the injury sustained by the plaintiff.*

2. ———: DAMAGES. The doctrine of this court is the rule of the common law, that surface water is a common enemy and an owner may defend his premises against it by dike or embankment; and if damages result to adjoining proprietors by reason of such defense he is not liable therefor.
3. ———: ———: NEGLIGENCE. But this rule is a general one and subject to another common law rule, that a proprietor must so use his own property as not to unnecessarily and negligently injure his neighbor.
4. ———: ———: ———. And, therefore, every proprietor may lawfully improve his property by doing what is reasonably necessary for that purpose, and unless guilty of some act of negligence in the manner of its execution, will not be answerable to an adjoining proprietor, although he may thereby cause the surface water to flow on the premises of the latter to his damage; but if in the execution of such enterprise he is guilty of negligence,

* For further discussion of the law relating to surface water, negligence, and damages, see *Morrissey v. Chicago, B. & Q. R. Co.*, 38 Neb., 406, *Lincoln Street R. Co. v. Adams*, 41 Neb., 737, *Anheuser-Busch Brewing Association v. Peterson*, 41 Neb., 897, *Bunderson v. Burlington & M. R. R. Co.*, 43 Neb., 545, and *Lincoln & B. H. R. Co. v. Sutherland*, 44 Neb., 526, and cases cited.

which is the natural and proximate cause of injury to his neighbor, he is accountable therefor. *Lincoln & B. H. R. Co. v. Sutherland*, 44 Neb., 526, and cases there cited followed.

5. ———: ———: ———: EVIDENCE. The city had the right to take such steps and perform such acts as in its judgment were necessary to protect its street from surface waters; but while it had this right, it was charged with the duty of exercising it with ordinary care. It was bound to know that this draw was the natural conduit through which the surface waters were wont to find their way to the river, and when it filled up the ditch in Court street into which this draw emptied it was charged with the duty of constructing sufficient ditches and outlets to carry the surface waters coming down the draw to the river.
6. **Municipal Corporations: DRAINAGE: NEGLIGENCE: DAMAGES.** It seems that negligence may be imputed to a municipal corporation and it may be made liable for damages resulting therefrom if its council and mayor, acting in good faith, adopt an insufficient or defective scheme or plan of drainage.
7. ———: ———: ———: ———. The act of the city in building dikes at Scott and Mary streets, and cutting ditches along those streets to the river, were ministerial acts.
8. ———: ———: ———: ———. Whether such ditches were properly constructed, and were of sufficient capacity for the purposes intended, were questions of fact; and whether their construction in the manner that they were constructed amounted to negligence on the part of the city was also a question of fact.
9. **Estoppel: DAMAGES.** The plaintiff by petitioning the city to grade and pave Court street did not estop herself from claiming damages as the result of the negligent omission of the city to provide suitable outlets for carrying off the water from the draw.
10. **Instructions.** Instructions in a case should be few in number and should present to the jury the law applicable to the issues in the case in simple language and terse sentences. Numerous instructions or instructions with long and involved sentences are more likely to confuse the jury and lead it astray than to enlighten it and direct it to the material points of the case.

ERROR from the district court of Gage county. Tried below before BUSH, J.

E. O. Kretsinger, for plaintiff in error.

George A. Murphy, contra.

RAGAN, C.

The Big Blue river runs south through the city of Beatrice, crossing Court street at right angles. The property of Mrs. Ellen Leary, consisting of some city lots and a dwelling house thereon, is situate on the north side of Court street and some distance west of where said street crosses said river. Cedar street opens into Court street immediately south of Mrs. Leary's property. One block south of Court street and parallel thereto is Mary street, and one block south of Mary street and parallel thereto is Scott street. The country to the south and west of Mrs. Leary's property inclines to the north and east to the river. In the summer of 1891, and prior thereto, a draw or swale, heading in the foot-hills of said river, some miles southwest of where the river intersects Court street, meandered from the hills in a northeasterly direction and entered Cedar street south of Scott street, thence along Cedar street into Court street immediately south of the Leary property, and there opened into a ditch or gulley extending down Court street to the Blue river. It seems from the record that the ditch was an artificial channel that had been made to take the place of the draw which had once extended down Court street to the river. In the summer and autumn of 1891 the city of Beatrice graded and paved Court street west of the river to a point west of the Leary property, and in doing so filled up the ditch in Court street through which the waters from the draw or swale above mentioned had been accustomed to find their way to the river. The draw was not a running stream as that term is commonly understood, although it would seem from the evidence that there was some water in some portions of it during most of the year. The draw was in fact a natural conduit through which the surface waters resulting from rains and melting

snows on a large area of country found their way to the Blue river. Mrs. Leary brought this suit in the district court of Gage county against the city of Beatrice. She alleged that in the spring of 1892 the waters came down in this swale or draw from the southwest along Cedar street to Court street and, being unable to escape to the river, overflowed said street and flowed on and damaged her property. The ground of negligence alleged by her against the city, and made the basis of her action, was that the city in grading and paving Court street filled up said ditch and failed to provide any outlet for the waters which were accustomed in times of rains or freshets to flow down in said swale or draw and thence escape by said ditch into the river. The city, in addition to a general traverse of the material allegations of the petition as to its negligence, pleaded as a defense to the action that the grading and paving of Court street were done upon the petition and request of the abutting property owners of said street—Mrs. Leary being among the number of said petitioners; and that by reason of her petitioning the city to grade and pave said street in the manner it did she was estopped from claiming damages against the city resulting from said paving and grading. A further defense was that the damages sued for were the result of an unprecedented and violent rain storm and flood of such a character as to be, in contemplation of law, the act of God. Mrs. Leary had a verdict and judgment, to reverse which the city has prosecuted to this court a petition in error.

1. The first contention of the city is that the damages awarded Mrs. Leary are excessive and appear to have been given under the influence of passion or prejudice. This contention cannot be sustained. The damages awarded are less than the damages testified to, and therefore the amount of the damages raises no presumption that the jury was influenced by passion or prejudice in making the award.

2. The second contention is that the verdict is not sustained by sufficient evidence. Two arguments are made in support of this assignment: (1.) That the city, prior to its paving and grading Court street, adopted a plan or scheme for the draining of the waters which were accustomed to come down said draw and ditch into the river; and to carry out this plan the city constructed dams or dikes across the draw at Scott and Mary streets and dug ditches along the sides of said streets from the draw to the river. The sufficiency of these dikes and ditches to accomplish the purposes for which they were constructed was passed upon by the jury, and we cannot say that they came to an incorrect conclusion. (2.) The principal argument, however, under this head is that the finding of the jury that the damages sustained by Mrs. Leary were not the result of the act of God, is wrong. The evidence on this subject was conflicting, and some of it as extraordinary as the freshet or rain storm was alleged to be. A large number of witnesses testified on behalf of Mrs. Leary that they had lived in the vicinity of Beatrice for a number of years and that the freshet or rain which injured her property, while it was a great rain, was no greater than other rains they had known there, or, in substance, that the rain was not an unprecedented flood, a cloud burst, or water spout. On the other hand, witness after witness in behalf of the city testified that it was the most violent flood they had ever known. The testimony of two of these witnesses and their names deserve a place in the piscatorial history of the state. One Frank Thompson testified that just prior to the rain he had crossed the draw in question on a pony and immediately after crossing the draw it began to rain, and before he could recross the draw the water had risen in it so high that the pony was compelled to swim, and the flood carried the pony and his rider over a wire fence; that after he had succeeded in crossing the draw he went down to the city—presumably on his pony—and that the flood carried him over more

wire fences; that the draw where he was when the rain began was twelve feet deep and forty feet wide, and that it was filled with water to the top of its banks in one second. The other witness, Schultz, had a barn near Scott street and the draw. He testified that the water rose in the draw up to the top of the roof of the barn and did so in five or six minutes. The record does not disclose whether or not the barn was washed away. It is asking too much of this court to disturb the verdict of a jury, based on evidence like the above. We are not fitted by our profession or training for such a task. Only a jury of the vicinage could find the straight and narrow way of truth and dry land in such storms and flood and Cimmerian darkness as this. The district court told the jury that if they believed from the evidence that the damage done to Mrs. Leary's property was the result of excessive, extraordinary, and unusual cloud bursts, rain storms, and floods, these would constitute under the law an act of God for which the city was not liable, unless they found from the evidence that the negligence of the city contributed in a "large degree along with the act of God" to the damage of the plaintiff. This instruction was correct. (*Republican V. R. Co. v. Fink*, 18 Neb., 89.) The evidence shows that Mrs. Leary's property was damaged by the freshet in the spring of 1892; that she sustained damages equal to the amount awarded by the jury; that her property was damaged by the waters that came down this draw to Court street, and by reason of the draw being there obstructed and the ditch in the street having been filled, were unable to escape to the river, and overflowed on her property; that this overflow was brought about by the act of the city in damming the draw and filling the ditch in Court street and failing to provide sufficient outlets or ditches down Mary and Scott streets or elsewhere to vent these waters. We therefore reach the conclusion that the finding of the jury, that the negligence of the city was the proximate cause of the in-

jury sustained by Mrs. Leary, has sufficient evidence in the record for its support.

3. Another assignment is that the verdict is contrary to law. Three arguments are made to support this assignment.

It is first insisted that the city had the lawful right to pave and grade Court street, and that in doing so it had a right to defend itself and its property against surface water, the common enemy, by filling the ditch in said street and diking or damming the draw that emptied into said ditch; and that it is not responsible for any damages that Mrs. Leary may have sustained resulting from its actions in that respect. The doctrine of this court is the rule of the common law, that surface water is a common enemy and that an owner may defend his premises against it by dike or embankment, and if damages result to adjoining proprietors by reason of such defense he is not liable therefor; but this rule is a general one and subject to another common law rule, that a proprietor must so use his own property as not to unnecessarily and negligently injure his neighbor; and, therefore, every proprietor may lawfully improve his property by doing what is reasonably necessary for that purpose, and, unless guilty of some act of negligence in the manner of its execution, will not be answerable to an adjoining proprietor, although he may thereby cause the surface water to flow on the premises of the latter to his damage; but if in the execution of such enterprise he is guilty of negligence which is the natural and proximate cause of injury to his neighbor he is accountable therefor. (*Lincoln & B. H. R. Co. v. Sutherland*, 44 Neb., 526, and cases there cited.) The city had the right to grade and pave Court street. It had the undoubted right to fill the ditch therein and to dike or dam the draw that emptied into said ditch. In other words, it had the right to take such steps and perform such acts as in its judgment were necessary to protect its street from surface waters; but while it had this

right it was charged with the duty of exercising it with ordinary care. It knew and was bound to know that this draw was the natural conduit from which the surface waters from a large area of surrounding country were wont to find their way to the Blue river; and when it diked this draw at Court street and filled up the ditch in said street it was charged with the duty of constructing sufficient ditches and outlets to carry the surface waters coming down said draw to the river.

Another argument under this assignment is this: Sometime in the spring of 1891 Mrs. Leary and other property owners along Court street petitioned the city of Beatrice to grade and pave said street. The argument is that the city having complied with this petition, Mrs. Leary is now estopped from claiming damages resulting from such grading and paving. It must be remembered, however, that the basis of Mrs. Leary's action against the city is not that her property was damaged simply because the city graded and paved Court street, but her cause of action is founded—and founded only—upon the alleged negligent omission of the city to provide suitable and sufficient outlets for the surface waters of the draw after the city had dammed it and filled the ditch into which it emptied. To sustain his contention counsel cite us to *Hembling v. City of Big Rapids*, 50 N. W. Rep. [Mich.], 741, where it was held: "Where plaintiff joined in a petition to the city council to grade and improve a street abutting his lots, paid his assessment for the improvement voluntarily without objecting to the improvement or the assessment, he is afterwards estopped from claiming damages by reason of the improvement, damming the water course across the street, and causing the water to flow his lots." To the same effect are *City of Pontiac v. Carter*, 32 Mich., 164, and *Collins v. City of Grand Rapids*, 54 N. W. Rep. [Mich.], 889. Whatever may be said of these decisions, they are of no force in this state under our constitution, which expressly provides that

private property shall neither be taken nor damaged for public use without just compensation. It may be that if the city in grading and paving Court street left Mrs. Leary's property either so far above or below grade as to damage it, that she, having petitioned the city to bring the street to grade, would be thereby estopped from claiming damages; but that point is not before us and we do not decide it. It would be going very far indeed to hold that because Mrs. Leary petitioned the city council to grade and pave this street that she thereby waived her cause of action against the city for damages it might do to her property in performing the grading and paving in a negligent manner.

The third argument is that the judgment is contrary to law, because the city adopted a plan for carrying the waters of this draw into the Blue river by building dikes, as already stated, across the draw at Scott and Mary streets and constructing ditches along said streets from the draw to the river; that the city in adopting this plan was exercising legislative functions, and that the city is not liable for any damages that have resulted, although the plan adopted was defective, as it is not liable in the absence of bad faith for a mere error of judgment. The authorities on this question are in hopeless conflict. On the one hand, it is held that the adoption of a plan of drainage by a city is a judicial act on the part of its governing body and that, therefore, the city is not responsible in damages if the plan adopted is insufficient or defective. On the other hand, it is held that the duty of a municipal corporation to provide drains and sewers is ministerial in its character and not judicial; and that municipal corporations are liable for the safety, sufficiency, and the skillful construction of its sewers and system of drainage. In *City of Indianapolis v. Huffer*, 30 Ind., 235, it was held: "An incorporated city is not ordinarily liable for consequential injuries to private property resulting from the grading and improvement of

its streets, if, in making such improvements, reasonable skill and care be used to avoid the injuries. The skill and care which is incumbent relates as well to the plan as to the execution of the work—in the case of a sewer, to its capacity, as well as to the mechanism in its construction.” We think this is the better rule. But to sustain the judgment in this case it is not necessary to decide whether negligence can be imputed to a city and it made liable for damages resulting therefrom, because its council, acting in good faith, erred in the plan or scheme of drainage adopted by it. If the city of Beatrice, in adopting the plan it did adopt for conveying the surface waters from the draw in question to the Blue river, exercised legislative functions, if the plan adopted was defective and imperfect, and if the city is not liable because of the adoption of such defective plan, still the building of the dikes at Scott and Mary streets, the cutting of the ditches along those streets to the Blue river, were ministerial acts; and if the city in building said dikes and in constructing said ditches negligently omitted to construct them on sufficient capacity to carry off the waters that were accustomed to flow down said draw, and damages resulted to the plaintiff as the proximate result of such negligent omission, the city was liable. Whether the ditches were properly constructed and were of sufficient capacity for the purposes intended were questions of fact; and whether their construction in the manner that they were constructed amounted to negligence on the part of the city was also a question of fact.

4. Some criticisms are indulged by counsel with reference to the instructions given and refused. We have carefully examined the points made by counsel, and reach the conclusion that no error prejudicial to the city was committed by the court in the giving or refusing of instructions. Without desiring or intending any reflection whatever upon the learned judge who tried this case or of the eminent counsel engaged therein, we deem it our duty to say

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that we think the jury in this case was instructed too much. At the request of the plaintiff the court gave the jury twelve instructions; at the request of the city, fifteen; and in addition to these there were six paragraphs or instructions in the charge given by the court to the jury on its own motion. Instructions in a case should be few in number and should present to the jury the law applicable to the issues in the case in simple language and terse sentences. Numerous instructions, or instructions with long and involved sentences, are more likely to confuse the jury and lead it astray than to enlighten it and direct it to the material points of the case. The judgment of the district court is

AFFIRMED.

CHRISTIAN CHRISTENSEN, APPELLANT, V. CITY OF
FREMONT ET AL., APPELLEES.

FILED MAY 21, 1895. No. 7616.

1. **Municipal Corporations: POWERS: ELECTRIC LIGHTING SYSTEM.** The power conferred upon cities of the second class having over 5,000 inhabitants, to provide for and regulate the lighting of the streets, implies the power to erect and maintain an electric lighting system for that purpose.
2. ———: ———: ———. From the power to provide for and regulate the lighting of streets, however, no power can be implied to erect or maintain a lighting system for the purpose of supplying light to private buildings.
3. ———: ———: ———. The latter power is conferred on such cities by Session Laws of 1889, chapter 19.
4. ———: ———: ———: **APPROPRIATIONS.** That act, in providing for the levy of a tax and the issuing of bonds for erecting and maintaining a lighting system, provides how money must be raised for the purpose when it is not already available; but where a city already has in its general fund sufficient unappro-

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riated funds, it may appropriate and use those funds for the purpose of erecting a lighting system.

5. ———: ———: ———: ———. A city of the second class having more than 5,000 inhabitants may make special appropriations for improvements at other times in other ordinances than the annual appropriation bill, provided such appropriations first receive the sanction of a majority of the electors either by petition or at an election.

APPEAL from the district court of Dodge county. Heard below before SULLIVAN, J.

E. F. Gray, for appellant.

Frank Dolezal and *J. E. Frick*, *contra*.

See opinion for authorities upon the questions discussed.

IRVINE, C.

This was an action by the appellant, a citizen and taxpayer of the city of Fremont, against that city, a city of the second class containing more than 5,000 inhabitants, and its officers, seeking an injunction to restrain the defendants from proceeding with the proposed erection of an electric light system, and from using the general fund and occupation tax money for the purpose of erecting such system. The case was heard in the district court on the petition, answer, and reply, without any evidence. The district court dismissed the action. No evidence having been introduced, the question is were the defendants entitled to a decree on the pleadings?

The answer contains no denials. It consists solely of affirmative matter, most of which is denied in the reply. The petition, with so much of the answer as the reply does not deny, must, therefore, be taken as a statement of the facts. The purpose of brevity at least will be subserved if we state the facts so found in narrative, without reproducing the pleadings. In February, 1895, the city

found itself with something over \$18,000 in its treasury in excess of the moneys which had been appropriated by the general appropriation bill of the current fiscal year, passed in July, 1894. A portion of this money was in what is known as the "general fund," collected under Compiled Statutes, chapter 14, article 2, section 52, subdivision 1, empowering such cities to levy a tax for general revenue purposes. The remainder of the money was derived from occupation taxes, levied under subdivision 8 of the same section, and not devoted to any special purpose. In February, 1895, the council passed an ordinance appropriating \$18,000 from these funds for constructing an electric light plant. This ordinance was passed in pursuance of a petition of a majority of the legal voters of the city sanctioning such action. Other steps were taken leading to the advertising for bids for the construction of the plant, and the city was about to proceed therewith and make payment out of the moneys referred to when these proceedings were begun.

The appellant contends, in the first place, that the city is without power to construct such works with the fund referred to, and, in the second place, that if it had the power, the manner of its proposed exercise is unlawful. For a consideration of the first question only two facts besides those already stated are material. The first is that the funds which it is proposed to expend seem to be accumulations resulting from overtaxation for prior years. The second is that while the ordinance lying at the foundation of the proceedings provides by its terms only for the construction of an electric light plant "for lighting the city," the petition avers, and the answer does not deny, that the purpose is not only to construct a plant for lighting the streets and city property, but also to furnish light to the inhabitants of the city for hire, and that for this purpose the cost of the plant will be \$10,000 more than the cost of a plant simply to light the streets and public buildings.

The city of Fremont is governed by the provisions of article 2, chapter 14, Compiled Statutes, relating to cities of the second class having more than 5,000 inhabitants. Section 52 of that article contains a partial enumeration of the powers vested in such cities. Subdivision 51 of that section gives to such cities power "to provide for and regulate the lighting of the streets, and the erection of lamp posts." Subdivision 17 of the same section, as originally enacted, authorized the city to make contracts with and authorize any persons, company, or association to erect gas works and give such persons, company, or association the exclusive privilege of furnishing gas to light the streets, lanes, and alleys of said cities for any length of time, not exceeding twenty-one years. In 1891 the latter section was amended so as to include electric lights as well as gas. In 1889 an act was passed (Session Laws, 1889, ch. 19, sec. 1) providing that "any city of the second class in this state shall have the power, and is hereby authorized, to establish and maintain a system of electric lights for such city, and the city council shall have the power to levy a tax, not exceeding five mills on the dollar in any one year, for the purpose of establishing, extending, and maintaining such system of electric lights." By section 2 of this act it was provided that if the tax authorized would be insufficient for the purpose, bonds might be issued on petition and vote to that end. Subsequent sections provided for the construction of the works and for their management after construction. There is no other legislation, so far as we are aware, bearing directly upon the matter.

As a starting point for the consideration of the question presented we may adopt the language of Judge Dillon, that a municipal corporation "possesses, and can exercise, the following powers, and no others: First, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the declared objects and purposes of the

corporation—not simply convenient, but indispensable.” (1 Dillon, *Municipal Corporations* [4th ed.], sec. 89.) This language has been so often quoted by courts of last resort, including the supreme court of the United States, that it may now be taken as the accepted formula in regard to municipal powers. Judged by this statement, we have no hesitation in declaring that the power to provide for and regulate the lighting of streets and the erection of lamp posts fairly implies the power to erect gas works or an electric light plant to be used by the city for the purpose of lighting the streets. (*State v. City of Hiawatha*, 53 Kan., 477; *City of Crawfordsville v. Braden*, 130 Ind., 149; *Mauldin v. City Council of Greenville*, 33 S. Car., 1.) On the same principle, it has been held that a grant of power to establish and regulate markets implies the power to purchase and to hold land for the purpose of a market. (*Ketchum v. City of Buffalo*, 14 N. Y., 356.) And the simplest and most obvious application of the principle is perhaps found in the apparently self-evident proposition, that a grant of power to prevent and suppress fires and to raise money for supporting the fire department implies the power to purchase engines and apparatus. (*Green v. City of Cape May*, 41 N. J. Law, 45.) Our attention is called to the case of *Spaulding v. Peabody*, 153 Mass., 129, holding that under somewhat similar grants of power a city may not erect and maintain works for the manufacture and distribution of electric light for lighting the streets. But this case is based to a large extent on a consideration of peculiar Massachusetts statutes and a narrow construction theretofore placed upon them by the court. The case is opposed to an otherwise practically uniform array of authorities. The reasoning on the general question is far from satisfactory, and while it is still a recent case, it has encountered already considerable adverse criticism. It is by no means so clear that from the power to provide for the lighting of streets any power is implied to maintain a plant for the

purpose of furnishing light for private buildings. It has been said that under an express power to erect gas works or water works the uniform rule is that a city is not limited to furnishing gas or water for use in public places, but may furnish the same for private use. (*Thomson-Houston Electric Co. v. City of Newton*, 42 Fed. Rep., 723.) But a power in express terms to erect a lighting plant for the city and a power merely to provide for lighting the streets are very different in their effect. The former power might imply a right to maintain the plant for all purposes for which such plants are generally used, while the latter grant might reasonably be restricted to its terms.

In the *City of Crawfordsville v. Braden*, 130 Ind., 149, it was held that in the absence of any express power a municipality has the inherent power to light its streets, and to determine the means to be adopted for that purpose, extending to the construction and maintenance of works therefor. Having gone so far, the court proceeds to hold that having the power for that purpose, the city may also maintain works to furnish light for private buildings. The reasoning resorted to in support of the last conclusion is far from convincing. The court says that to light residences and places of business of the inhabitants is a legitimate exercise of the "police power." Elsewhere, in the opinion, the police power is referred to as a term "difficult to precisely define or limit." If the view of the Indiana court is to prevail, it might better be said that it is a term without definition or limitation. The result of some of the cases relating to the police power arouses the suspicion that courts have sometimes been disposed to seek in this term an excuse for sustaining acts seemingly conducive to the general welfare where no satisfactory legal reason for such action can be found. We think the case under discussion illustrates the danger of seeking that refuge. The court finds the police power involved in the lighting of houses from the fact that an incandescent electric light is

safer to property and more conducive to health than the ordinary light. The argument is, in brief, thus: A municipality possesses inherently the police power. The police power exists for purposes of public health and safety. The incandescent electric light is safer and more wholesome than other lights. Therefore, without any grant of power in the premises, a city may maintain electric light works for the purpose of selling light to its inhabitants for use in their business houses and residences. No further comment on this case seems necessary.

In *Mauldin v. City Council of Greenville*, 33 S. Car., 1, it was held that a general grant of power to hold property, and to establish ordinances respecting the streets, for the security and convenience of the city, for preserving life and property therein, and for securing the peace and good government of the same, conferred express power to purchase and implied power to maintain an electric light plant for lighting the streets and public buildings, but not for furnishing light to private residences and places of business. It was said that powers are given solely for the purpose of government and not to enter into private business of any kind outside of the scope of government.

Other recent authorities to which our attention has been directed throw little light on the precise question we are now considering. Thus, in *Metcalfe v. City of Seattle*, 1 Wash., 297, no question of power was involved. The only question was the construction of a statute limiting indebtedness and as to the number of voters required on a proposition submitted. The case of *Thomson-Houston Electric Co. v. City of Newton*, 42 Fed. Rep., 723, construes an Iowa statute granting power to establish and maintain electric light plants as extending to the furnishing of light to the inhabitants; and the case of *Smith v. City of Nashville*, 88 Tenn., 464, holds that a power to provide the city with water-works implies a power to furnish water to the inhabitants for private use.

Following the rule stated by Judge Dillon, it is quite clear that a power to provide for and regulate the lighting of streets does not expressly authorize the maintenance of a plant to light private buildings for pay. It is equally clear that the exercise of such a power is not indispensable to the fulfillment of the purposes of the corporation. Nor can we say that such a power is implied in, or incident to, the express power to provide for lighting the streets. We are constrained to agree with the supreme court of South Carolina, that while the power to light the streets authorizes the erection and maintenance of a plant for lighting the streets, it does not authorize one for supplying light to private buildings. The act of 1889, above referred to, extends the grant of power to the purpose in question. It authorizes the establishment and maintenance of a "system of electric light for such city." The cases already cited, of *Thomson-Houston Electric Co. v. City of Newton* and *Smith v. City of Nashville*, would be applicable under that grant. But the later sections of the act provide for fixing and collecting rates to be charged the inhabitants for the use of lights and so render the object of the act clear beyond question. We have, then, the city empowered by the act of 1889 to erect and maintain a plant for all the purposes here contemplated. This act authorizes a levy of a tax to create a special fund for the purpose, and if such tax be insufficient the issuing of bonds after a petition and election on the question. The city of Fremont does not propose to levy a tax, neither does it propose to issue bonds. On the other hand, it proposes to use the moneys already accumulated from general taxation, and from occupation taxes. We have thus elaborated on the grant of powers because the conclusions reached convince us that in the absence of the act of 1889 the city could not have devoted any revenue to the purpose of maintaining a plant to furnish light for private consumers. Its right to do so is derived solely from the act of 1889, which contains authority to provide means

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therefor in a special manner. The precise question then is, whether this manner of payment is exclusive, or whether, on the other hand, moneys already being available from other sources, they may be devoted to this purpose. The money in the general fund was collected under subdivision 1, authorizing the levy of taxes for general revenue purposes. Subdivision 8, authorizing occupation taxes, makes no special disposition thereof, and moneys so collected are, therefore, available for any general municipal purpose.

In *Merrill Railway & Lighting Co. v. City of Merrill*, 80 Wis., 358, a tax for general city purposes, not exceeding two per cent of the assessed valuation, was authorized. It was elsewhere provided in the charter that in addition to the amount limited for general city purposes special taxes might be levied for certain designated purposes, among them "gas purposes," but that no such tax should be levied until recommended by the council and approved by a vote of the people. It was held that the lighting of streets was a general municipal purpose, and that without a vote and without a special tax, the two per cent tax might be used for that purpose. This case does not extend so far as the one before us, because it was not contemplated to use any portion of the tax except for a public municipal purpose. But we think the general principle is applicable. If the city of Fremont did not have in its treasury money available for the purpose contemplated, then the act of 1889 provides how the money might be raised; but if it has money in its treasury available for the purpose, we see no reason why an indebtedness should be incurred, or additional taxation imposed. The act of 1889, in so far as it relates to taxation and bonds, provides for the raising of money when it is necessary to raise it; but we do not think that the means there provided must be resorted to when money is already available. The funds which it is proposed to expend are available for any municipal purpose for which a special tax is not necessary, or a special form

of taxation provided. All the occupation tax seems to be available for any purpose for which the general fund is available. If a special tax were levied for this purpose it would be collected in the same manner as the general fund has been collected; if bonds were issued, they would have to be paid by taxes collected in like manner. The money being now in the treasury collected for general revenue purposes, and the act of 1889 conferring upon the city complete power to erect and maintain such a plant as is contemplated, we think the power exists to use the accumulated fund to pay therefor. ←

We are thus brought to a consideration of the second contention, to-wit, the power being conceded, has the city proceeded in the proper manner to execute it?

Section 39, article 2, chapter 14, Compiled Statutes, is as follows: "The city council shall, within the last quarter of each fiscal year, pass an ordinance, to be termed the 'annual appropriation bill,' in which such corporate authorities may appropriate such sum or sums of money as may be deemed necessary to defray all necessary expenses and liabilities of such corporation, not exceeding in the aggregate the amount of tax authorized to be levied during the then ensuing year; and in such ordinance shall specify the objects and purposes for which such appropriations are made, and the amount appropriated for each object or purpose. No further appropriations shall be made at any other time within such fiscal year unless the proposition to make such appropriation has been first sanctioned by a majority of the legal voters of such city, either by a petition signed by them, or at a general or special election duly called therefor; and all appropriations shall end with the fiscal year for which they were made; *Provided*, That the fund arising from 'road taxes,' as in this chapter provided, shall be deemed specially appropriated, and shall not be included in the annual appropriation ordinance; *And provided further*, That no warrant shall be drawn, account allowed,

or debt contracted with reference to such fund unless there shall be money in the treasury for the payment thereof; *And provided further*, That nothing herein shall be construed to prohibit the council from appropriating other money in the annual appropriation bill for the use of streets, grades, and bridges."

Section 40 is as follows: "Before such annual appropriation bill shall be passed the council shall prepare an estimate of the probable amount of money necessary for all purposes to be raised in said city during the fiscal year for which the appropriation is to be made, including interest and principal due on the bonded debt and sinking fund, itemizing and classifying the different objects and branches of expenditures, as near as may be, with a statement of the entire revenue of the city for the previous fiscal year, and shall enter the same at large upon its minutes, and cause the same to be published four weeks in some newspaper published or of general circulation in the city."

Section 41, so far as it is applicable, is as follows: "The mayor and council shall have no power to appropriate, issue, or draw any order or warrant on the treasury for money, unless the same has been appropriated or ordered by ordinance, or the claim for the payment of which such order or warrant is issued has been allowed, according to the provisions of this chapter, and appropriations for the class or object out of which such claim is payable has been made as provided in section 41 (39). Neither the city council, nor any department or officer of the corporation, shall add to the corporation expenditures in any one year anything over and above the amount provided for in the annual appropriation bill for that year, except as herein otherwise specially provided; and no expenditure for any improvement, to be paid for out of the general fund of the corporation, shall exceed in any one year the amount provided for such an improvement in the annual appropriation bill."

In June of 1894 an estimate was prepared in accordance with section 40, and a tax levy made. In July the annual appropriation bill was passed. Neither the estimate, the levy, nor the appropriation bill included the electric lighting plant. In February, 1895, however, a petition of a majority of the legal voters of the city sanctioning such action having been presented, an ordinance was passed appropriating the money which the city now seeks to expend for this purpose. It is argued that this is not a lawful appropriation, and the argument is based on that part of section 41, to the effect that no expenditure for any improvement to be paid for out of the general fund of the corporation shall exceed the amount provided for such an improvement in the annual appropriation bill. We think that this clause should be read in connection with that preceding, to the effect that nothing shall be added to the corporation expenditures above the amount provided for in the annual appropriation bill except as is otherwise specially provided, and the whole section in connection with section 39, authorizing appropriations outside the appropriation bill, when sanctioned by a majority of the legal voters, either by petition or at an election. The requisite petition was presented in this case, and we think it authorized the special appropriation.

The cases of *City of Blair v. Lantry*, 21 Neb., 247, and *McElhinney v. City of Superior*, 32 Neb., 744, are not in point, because in those cases there had been no appropriation whatever.

JUDGMENT AFFIRMED.

WILLIAM R. COX v. O. H. BARNES.

FILED MAY 22, 1895. No. 5657.

1. **Attorney and Client.** It is a well settled rule that an attorney is bound to the most scrupulous good faith, when acting for his client. He must be loyal to the interests intrusted to his care. The members of a firm of attorneys cannot represent opposite sides of the same cause without the knowledge and consent of the clients.
2. **Judgment: COLLATERAL ATTACK.** After a firm of attorneys had been employed by a defendant a new member was taken into such firm, to whom the client revealed the evidence upon which he relied to defeat the action, and subsequently such attorney was employed by, and rendered assistance on the trial to, the adverse side, with full knowledge of the defendant and without objections. A judgment was rendered in favor of the plaintiff. *Held*, In an action on such judgment in another state the defendant could not set up as a defense thereto that the judgment was obtained by the fraudulent conduct of the attorney, but that on calling of the original cause for trial, the defendant should have moved the court to exclude the attorney from appearing for and assisting the adverse side.

ERROR from the district court of Pierce county. Tried below before ALLEN, J.

Wigton & Whitham, for plaintiff in error.

Benjamin Lindsay, W. W. Quivey and Powers & Hays,
contra.

NORVAL, C. J.

On the 13th day of January, 1890, in a cause pending in the district court of Montague county, Texas, a judgment was rendered in favor of O. H. Barnes, and against William R. Cox, for \$1,650 debt and \$73.75 costs of suit. This action was brought upon said judgment in the district court of Pierce county, this state. The petition is in

the usual form. The amended answer, for a defense, avers that the judgment declared upon was obtained by the plaintiff by fraud and undue means. The allegations of fraud set up in the answer are as follows: "That plaintiff, after the commencement of the action upon which said judgment was obtained, fraudulently, corruptly, and for the purpose of influencing defendant's attorneys against defendant's interests, and preventing their performing and causing them to neglect their duties toward defendant in the trial and defense of the said action so that plaintiff might obtain said judgment, employed and procured the services of one J. M. Chambers, an attorney at law, and a member of the firm of Stephens, Herbert & Chambers, who were at the time the employed attorneys of defendant in the action, to assist plaintiff in the trial and prosecution of said action and the procuring of said judgment, well knowing that said Chambers was one of the said firm of Stephens, Herbert & Chambers, and that said firm were defendant's attorneys as aforesaid, and agreed to and did pay said Chambers therefor the sum of \$100 for the benefit of said firm of Stephens, Herbert & Chambers." The answer further charges that by reason of the fraudulent employment of Chambers and said undue and corrupt influence on the part of plaintiff, the defendant was prevented from having a fair and impartial trial of the issues in said court; that defendant did not discover the said fraudulent acts and conduct until the trial had begun, and that they were not fully known until after the rendition of the judgment; that the defendant was not indebted to the plaintiff in any sum whatever in the suit in which said judgment was obtained, but had a complete defense to the action. The plaintiff for reply denied all charges of fraud made in the answer. At the close of the defendant's testimony the court, on motion of the plaintiff, instructed the jury to return a verdict against the defendant for the full amount claimed, which was accordingly done, and from a judg-

ment entered thereon, and an order overruling a motion for a new trial, the defendant prosecutes error.

The question presented for determination in this cause is whether the court below erred in directing a verdict for the plaintiff. In other words, was the Texas judgment procured by fraudulent means? The charge of fraud consists in the employment by Barnes of one J. M. Chambers as an attorney to assist in the trial of the case. It appears from the testimony contained in the bill of exceptions that the law firm of Potter & Edleman brought the suit for Barnes in the Texas court, and the firm of Stephens & Herbert, attorneys, of Montague, Texas, was originally employed by Cox to make his defense; that afterwards, in the spring of 1889, which was several months prior to the trial, the said Stephens and Herbert formed a partnership with J. M. Chambers, under the firm name of Stephens, Herbert & Chambers, by the terms of which agreement Chambers was to assist in the disposition of the unfinished business of the old firm, where he was not then adversely interested, and was to receive a part of the fees for so doing; that Stephens & Herbert, together with J. G. Johnson, of Kansas City, Missouri, represented Cox in the trial, and that J. M. Chambers assisted Potter & Edleman in the prosecution of the case. There is some conflict in the proofs as to the time when Chambers was employed by Barnes. Some of the testimony is to the effect that he was retained prior to the formation of the firm of Stephens, Herbert & Chambers, while there is other evidence tending strongly to show that he was not engaged until the day the case was called for trial in January, 1890. It does, however, appear that Barnes was aware at the time of the employment of Chambers that the latter was a member of the firm of Stephens, Herbert & Chambers, and that Stephens & Herbert were Cox's attorneys. Also, there is in the record testimony to the effect that a few days prior to the trial, Cox went to Montague to confer with his attorneys,

and while there Mr. Stephens introduced Mr. Chambers to him as his partner, and thereafter Cox consulted with Chambers as well as Stephens about the case, disclosing to them the papers and evidence he intended to use on the trial. The authorities agree that an attorney, when once employed in a case, is bound to the most scrupulous good faith; that he must be loyal to the interests of his client; that where the client has conferred with his attorney or revealed to him the evidence upon which he relies for the prosecution of the cause or for making his defense to the action, as the case may be, the attorney, after acquiring such knowledge, or after having opportunities for knowing the facts, will not be permitted to sell out his client's interests or to accept a retainer from or render assistance to the adverse party. If he do so, without the knowledge or consent of his client, the judgment thus obtained may be set aside on the ground of fraud. (*Haverty v. Haverty*, 35 Kan., 438; Black, Judgments, sec. 344.) In the case at bar Cox had a right to expect that Chambers would assist in the trial of the case, notwithstanding he became a member of the firm after Stephens & Herbert were employed by Cox; or, at least, he was justified in believing that Chambers could not lend his assistance to the other side. It is undisputed that Cox was present in the Texas court during the entire trial, and that neither he nor his attorneys made any objection to Chambers appearing in the case for Mr. Barnes, although he was fully advised of such appearance at the very commencement of the trial. Cox should have then and there called the attention of the court to the fact and had Chambers excluded from taking part in the case on the other side. He could not sit idly by, omit to bring the facts to the knowledge of the court, and take the chances on obtaining a favorable verdict, and, if unsuccessful, set up in another court in a suit upon the judgment that such judgment was procured by fraud. He should have moved the Texas court to exclude Cham-

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bers from assisting in the case. Not having done so, he cannot now be heard to complain. (*Wilson v. State*, 16 Ind., 392; *Gaulden v. State*, 11 Ga., 47.) The district court did not err in directing the verdict, and the judgment is

AFFIRMED.

EMMA KLECKNER V. W. W. TURK ET AL.

FILED MAY 22, 1895. No. 6230.

1. **Corporations: VALIDITY: COLLATERAL ATTACK.** Where parties in good faith organized as a corporation and substantially complied with the conditions prescribed as precedent to the commencement of business by the law governing the formation of corporations, such as the adoption of articles of incorporation and filing the same with the county clerk of the county in which the business was to be conducted, and have entered upon the discharge of corporate functions and so continued for a considerable length of time, although if challenged by the state in a proper proceeding it might be declared illegal, such organization was not vulnerable to a collateral attack by a person who contracted with it in its corporate capacity and thus acknowledged and recognized its corporate existence, the object of such attack being to recover upon the contract, against the stockholders of the corporation individually, or to render them liable thereon as members of an unincorporated association or partnership.
2. **Statutes: CONSTRUCTION: PENALTIES.** A liability which is created by statute to follow as a consequence of the doing or omission of some act, and the extent of which is not measured or limited by the damage caused by the act or omission, is in the nature of a penalty and the statute penal in its character.
3. **Corporations: PENAL STATUTES.** The liability imposed by section 139, chapter 11, General Statutes, 1873, was for the omission to do acts not conditions precedent to the commencement of business by a corporation, and such liability existed solely by reason of the legislative enactment of such section and was in the nature of a punishment and consequently penal.
4. **Statutes: PENALTIES.** Section 136, chapter 11, General Statutes,

1873, was penal. *Globe Publishing Co. v. State Bank of Nebraska at Crete*, 41 Neb., 175, followed.

5. ———: REPEAL. Sections 136 and 139 of chapter 11, General Statutes, 1873, were repealed by an act approved April 6, 1891.
6. Corporations: LIABILITY OF STOCKHOLDERS. When an organization has become a corporation *de facto*, but failed to perform some requisitions of the law under which it was created, not conditions precedent to its beginning the exercise of corporate rights and powers, but essentials to its becoming a technical *de jure* corporation, its existence could not be collaterally attacked by persons contracting with it, in order to render the stockholders liable on such contract individually or as partners, but it was its duty to comply with the requirements of section 136, chapter 11, General Statutes, 1873, while in force, and its members will not be heard to allege its lack of a *de jure* character to avoid liability for failure to comply therewith.
7. Statutes: ABATEMENT OF ACTIONS. As a general rule, the repeal of a statute which confers the right to an action, the remedy provided existing solely by and through such statute, or the repeal of a penal statute, abates a suit pending to enforce the remedy provided or destroys any right of action which has accrued thereunder; but in states where a general saving clause has been enacted it enters into such repeal and renders it conditional or inoperative upon the law, inasmuch as it might affect accrued rights of action or pending suits.
8. Constitutional Law: STATUTES. The passage of a statute to operate as a general saving clause and which shall have the force and effect to continue rights and remedies unless a repealing statute contains an expression of the intention that such rights and remedies shall not be saved or continued, is within the power of the legislature.
9. ———: ———. The act of the legislature approved April 6, 1891, entitled "An act to amend section 136 and section 139 of chapter 16, Compiled Statutes, 1889, and to repeal said original sections," is not unconstitutional on the ground that the subject-matter of the portion of the act, which makes its provisions operative as to actions pending or accrued, is not expressed in or not sufficiently stated in the title.
10. Judgment: TRIAL: PRACTICE. In a judicial district having two judges, Judge Bush heard and overruled a demurrer to a petition and defendants answered. During the trial of the cause, which was conducted by Judge Babcock, the defendants

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objected to the introduction of any testimony on the ground that the petition did not state a cause of action. This objection was overruled. After the reception of the evidence Judge Babcock instructed the jury to return a verdict for defendants, stating as a reason for so doing that the pleadings, evidence, and law would not sustain a different verdict. *Held*, To be correct practice, and not erroneous on the ground that it reversed the ruling of Judge Bush upon the demurrer to the petition, as another element entered into the consideration of the case by Judge Babcock, viz., the evidence.

11. **Pleading: AMENDMENTS: REVIEW.** Amendments to pleadings should always be permitted when in furtherance of justice, but their allowance rests largely in the discretion of the trial court, and this court will not interfere with the exercise of such discretion unless there has been an abuse of it.

ERROR from the district court of Richardson county.
Tried below before BABCOCK, J.

Frank Martin and C. Gillespie, for plaintiff in error:

Failure to publish the notice required by sections 130 and 131, chapter 16, Compiled Statutes, is a fatal defect; without such notice there can be no valid incorporation; it is a condition precedent to the creation of a valid corporation. (*Heinig v. Adams & Westlake Mfg. Co.*, 81 Ky., 300; *Kaiser v. Lawrence Savings Bank*, 56 Ia., 104; *Clegg v. Hamilton*, 15 N. W. Rep. [Ia.], 865; *Eisfeld v. Kenworth*, 50 Ia., 389; *Bigelow v. Gregory*, 73 Ill., 200; *Heuer v. Carmichael*, 47 N. W. Rep. [Ia.], 1034; 1 Beach, Private Corporations, sec. 12; *Abbott v. Omaha Smelting Co.*, 4 Neb., 423; *White v. Blum*, 4 Neb., 560; Cook, Corporations [2d ed.], sec. 234.)

The articles of incorporation are fatally defective in failing to state the "highest amount of indebtedness or liability to which the corporation shall, at any one time, be subject, which must in no case exceed two-thirds of the capital stock." (Compiled Statutes, ch. 16, sec. 128; *Heuer v. Carmichael*, 47 N. W. Rep. [Ia.], 1034; Cook, Corporations [2d ed.], sec. 234.)

Plaintiff should have been allowed to amend her petition at the trial. The amendments asked were in furtherance of justice. Section 144 of the Code has broadened out the right of amendment so far, even after judgment, that the denial of the right to plaintiff is alone sufficient to reverse the judgment. (*Hale v. Wigton*, 20 Neb., 83; *Berrer v. Moorhead*, 22 Neb., 687; *Brown v. Rogers*, 20 Neb., 547; *Ward v. Palin*, 30 Neb., 376; *Roberts v. Tattlor*, 19 Neb., 184; *Burlington & M. R. R. Co. v. Crockett*, 17 Neb., 570; *Catron v. Shepherd*, 8 Neb., 308; *Keim v. Avery*, 7 Neb., 54.)

In a district where there are two judges their respective rulings should tend to support each other's previous rulings in cases tried. In this case Judge Bush had overruled the demurrer to plaintiff's petition. At the trial Judge Babcock directed the jury that the pleadings, evidence, and the law would not sustain a verdict in plaintiff's favor. This is a practice that cannot be tolerated. A ruling made by one of the judges of the district must be respected by the other, otherwise confusion and uncertainty will be the result. (*Marvin v. Weider*, 31 Neb., 774.)

The plaintiff seeking to collect her debt from the defendants as individuals is not estopped to deny the incorporation of the bank. (*Cook*, Stockholders [2d ed.] secs. 234, 283, 637; *Abbott v. Omaha Smelting Co.*, 4 Neb., 416; *Garnett v. Richardson*, 35 Ark., 144; *Ferris v. Thaw*, 72 Mo., 446; *Hurt v. Salisbury*, 55 Mo., 310; 1 Beach, Private Corporations, sec. 16; *Bigelow v. Gregory*, 73 Ill., 197; *Indianapolis Mining Co. v. Herkimer*, 46 Ind., 142.)

The repealing act of 1891, repealing sections 136 and 139, chapter 16, is unconstitutional and void. Under our law an ordinary repeal of the sections would have in no manner affected the plaintiff's rights. (Compiled Statutes, ch. 88, sec. 2.) The act was broader than its title, which did not comprehend the retroactive effect which the law was designed to have. It is obnoxious to the provisions of

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section 11, article 3, of the constitution. (*City of Tecumseh v. Phillips*, 5 Neb., 305; *Messenger v. State*, 25 Neb., 674; *State v. Lancaster County*, 6 Neb., 474; *Holmburg v. Hauck*, 16 Neb., 337; *Touzalin v. City of Omaha*, 25 Neb., 817; *White v. City of Lincoln*, 5 Neb., 516.)

The repealing act is unconstitutional for the further reason that it seeks to impair the validity of the contract entered into between plaintiff and defendants, of which the law in force became a part, and that it seeks to destroy the vested right of plaintiff to recover her money from any of the defendants. (Constitution, U. S., sec. 10, art. 1; Constitution, Neb., sec. 16, art. 1.) 'The liability sought to be enforced by plaintiff was not a penalty, and could not be taken away. (*Doolittle v. Marsh*, 11 Neb., 243; *Howell v. Roberts*, 29 Neb., 483; *Coy v. Jones*, 30 Neb., 798.)

E. W. Thomas, R. S. Malony, J. H. Broadly, Webster, Rose & Fisherdict, and W. E. Stewart, contra:

The Farmers & Merchants Bank of Humboldt was a *de facto* corporation whose legal right to exist could not be questioned, except by the sovereign authority. (*Cory v. Lee*, 8 So. Rep. [Ala.], 694; *Snider's Sons Co. v. Troy*, 4 Am. R. & Corp. Cas. [Ala.], 25; *Lincoln Building Association v. Graham*, 7 Neb., 173; *Abbott v. Omaha Smelling Co.*, 4 Neb., 420; *Porter v. Sherman County Banking Co.*, 36 Neb., 271; 1 Beach, Private Corporations, secs. 13, 14; *Merchants Bank v. Stone*, 38 Mich., 779.)

The liability sought to be enforced is not contractual, but one imposed by statute and penal in its nature. (*Fay v. Noble*, 7 Cush. [Mass.], 188; *First Nat. Bank v. Almy*, 117 Mass., 476; *Stout v. Zulick*, 48 N. J. Law, 599; *Planters & Merchants Bank v. Padgett*, 69 Ga., 164; *Gartside Coal Co. v. Maxwell*, 22 Fed. Rep., 197; *Stokes v. Findlay*, 4 McCrary [U. S. C. C.], 205; *Whitney v. Wyman*, 101 U. S., 392; Taylor, Corporations, 148; *White v. Blum*, 4 Neb., 563.)

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Rights and remedies given by statute are lost by unconditional repeal of the statute. (*Bennet v. Hargus*, 1 Neb., 423; *Johnson v. Hahn*, 4 Neb., 146; Sedgwick, Construction of Statutory & Constitutional Law, 100; *Gregory v. German Bank of Denver*, 3 Col., 332; *Sayles v. Brown*, 40 Fed. Rep., 8; *Breitung v. Lindauer*, 37 Mich., 230; Cooley, Constitutional Limitations [4th ed.], 152.)

G. W. Cornell, also for appellees:

The repealing statute is valid. The saving clause is not of itself a separate subject, but incidental to the matter repealed. The title need not set out the particulars of the amendment. It is sufficient that the subject is fairly expressed in the title. (*State v. Ream*, 16 Neb., 681; *Bonorden v. Kriz*, 13 Neb., 121; *Miller v. Hurford*, 13 Neb., 17; *People v. Mahaney*, 13 Mich., 494; *People v. McCallum*, 1 Neb., 194; *State v. Babcock*, 23 Neb., 128.)

Isham Reavis, also for appellees.

HARRISON, J.

The plaintiff commenced this action to recover of the defendants the sum of \$6,052.53 and interest alleged to have accrued thereon. The petition states in substance: "The said plaintiff complains of said defendants, and for cause states that at the date of the written instruments or obligatures hereinafter copied and set forth, and for several years just immediately preceding said dates and for some time thereafter, as hereinafter stated, the said defendants were associated together and doing, operating, and conducting a general banking business in the city of Humboldt, in said Richardson county, state of Nebraska, under the name and style of the Farmers & Merchants Bank of Humboldt, Nebraska, with said defendant Robert C. Lambertson, as the cashier of said bank, authorized for and in behalf of said defendants to receive deposits of money into said bank

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and issue drafts or bills of exchange and certificates of deposits therefor."

What is denominated the first cause of action is an allegation of a deposit by plaintiff in the bank of \$6,445, December 7, 1888, and the issuance to her by the cashier thereof of a certificate evidencing such deposit, it being, as is shown by the copy in the petition, what is generally known as a "time certificate," and payable in one year after date. There are three credits or payments pleaded, which are stated to have been received since the assignment of the bank. The second cause of action is predicated upon the purchase of a draft by plaintiff of the defendants through the cashier of the bank, in the sum of \$200, drawn on the National Bank of Kansas City, and which, it is alleged was duly presented and not paid for want of funds belonging to the bank issuing it to meet it. Certain payments are stated to have been received and credited upon the draft, derived from the assets of the Humboldt bank since the assignment. It is further pleaded:

"4. The said defendants claim that their said bank was a duly incorporated bank under the laws of the state of Nebraska, under the name and style of the Farmers & Merchants Bank of Humboldt, Nebraska; that it was so organized and incorporated on or about the 1st day of July, A. D. 1879. The said corporation or bank of said defendants operated and conducted said bank as above from about the 10th day of July, 1879, to about the 29th day of June, 1889, when said corporation made an assignment, as an insolvent institution or corporation under the general assignment laws of the state of Nebraska, to the sheriff of said county.

"5. The said plaintiff alleges that from the organization of said banking corporation of said defendants, on or about July 10, A. D. 1879, to the said assignment, on or about June 29, A. D. 1889, the said defendants were stockholders and members of said corporation, and are still

so related and connected with the affairs of said assigned bank.

"6. The said plaintiff further alleges that at the time when said plaintiff deposited her said moneys in said bank, and at the times and dates when said indebtedness was contracted and said certificate of deposit or promissory note was delivered to said plaintiff as above stated, and when said draft or bill of exchange was made and delivered to this plaintiff as above stated, and for a long time before and ever since then, the said corporation or banking institution of defendants was insolvent."

Here follows a general allegation of the failure of defendants and their banking corporation "to comply with the laws of Nebraska regulating such corporations, and that by reason of such failure the defendants were rendered individually liable for debts contracted by the corporation, and also allegations of failures in particular, viz.: 'To publish notice of the organization of the banking corporation; to post up a copy of the by-laws of the corporation in a conspicuous position at the place of business for the inspection of the public; that for more than a year immediately preceding the transaction, as the result of which the liability from defendants to plaintiffs arose," the defendants and their banking corporation did not give an annual notice of all the existing debts of the corporation by publication of a statement in a newspaper, and by reason of the non-compliance in these instances specified the defendants became personally and individually liable for the payment of any debts contracted by the corporation, the bank. Motions to require the plaintiff to make her petition more definite and certain were filed and overruled, demurrers were then interposed which were also overruled. One defendant, Lambertson, elected to stand upon his demurrer and plead no further. The defendant Stuart filed his separate answer, which contained a general denial of the allegations of the petition and a statement that he never owned more than

one share of the stock in the Farmers & Merchants Bank of Humboldt, and on or about April 10, 1887, in good faith and for full value, sold, transferred, and delivered such stock to Robert C. Lambertson, who was at the time the cashier of the bank, and from said date the said Stuart had not possessed any stock in the bank and had no interest therein and was not a stockholder at the time of the alleged transactions between plaintiff and the bank. Mullen and Fergus answered and admitted, and also averred, the incorporation of the bank and its commencement of business under such incorporation during the spring of 1879, and continuance of the banking business for more than ten years and until July, 1889; admitted that they were the owners of stock of the bank; alleged lack of knowledge of the instruments upon which plaintiff declared in her petition, but stated that the draft was dishonored because not presented for payment within a reasonable time; and after some other and further statements of defenses, not necessary to be noticed here, denied each and every allegation of the petition not expressly admitted. The defendants W. N. Nimms and T. J. Frazer filed an answer, which was in substance the same as that of Mullen and Fergus, a summary of which has just been given, except that it contained no affirmative averment of the organization of the bank as a corporation, they contenting themselves with admitting it. Frye in his answer averred the organization of the banking corporation and the time it began business, the length of time it continued therein, his ownership of stock and sale and transfer of the same prior to the time of the occurrences upon which the plaintiff's causes of action are founded, and that he has never since such transfer had any interest in the bank or its business, and after some further allegations, which we need not notice, closed with the usual form of general denial. A portion of a reply filed by plaintiffs was, on motion, stricken out and an amended reply filed, in which there was a denial of the

incorporation of the bank or that it ever became a valid corporation, and an allegation that "the said banking institution, and the said members claiming to be shareholders thereof, wholly and entirely failed and neglected to file a copy of the articles of incorporation of said banking institution in the office of the secretary of state in and for the said state of Nebraska, and no such copy of said articles of incorporation was ever so filed in said office of the said secretary of state as required by said laws." This was followed by a general denial of all the affirmative matter in the answer. There were also replies to the answers of Stuart and Frye, which were, so far as we care to notice them here, general denials. A jury was impaneled and a trial had, and after the close of the evidence and a portion of the argument to the jury had been made by counsel, the court instructed the jury as follows: "The jury are instructed that the pleadings, the evidence, and the law will not sustain a verdict in this case against the defendants, or any of them. You are therefore directed to find a verdict in favor of defendants." The jury, in obedience to the directions of the court, signed and returned a verdict for defendants. A motion for new trial was filed for plaintiff, submitted, and overruled, and the case is presented to this court by plaintiff for review.

The aim of the plaintiff in this action, allowing the allegations contained in her pleadings to be its exponents, seems to have been threefold in reference to the liability which it was sought to establish against the defendants: First, a liability as unincorporated persons, or partners; second, a liability under a provision of the statute for failure to perform certain requisitions of the law in relation to the formation of corporations, not specifically set forth in the section of the statute, but referred to in general terms; third, the accountability provided by statute, arising from the non-performance of a duty specifically stated and required by the section fixing the liability for such failure.

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The establishment of the first was dependent upon it appearing in the case that the parties were not incorporated and the bank had no corporate existence. It did appear that the defendants met and organized, elected officers, procured articles of incorporation to be drafted, which were adopted, filed, and recorded in the office of the county clerk of the county in which the bank conducted its business. The bank was then opened and commenced its operations and continued in the general banking business about ten years; and it was during this time, and near the close of it, that the transactions occurred upon which this action is primarily based. Section 126 of chapter 16 (Compiled Statutes, 1893) of our law in relation to corporations and their formation is as follows: "Every corporation, previous to the commencement of any business, except its own organization, when the same is not formed by legislative enactment, must adopt articles of incorporation * * * and have them recorded in the office of the county clerk of the county or counties in which the business is to be transacted, in a book kept for that purpose;" and it is further provided in section 132 of the same chapter that the corporation may commence business as soon as its articles of incorporation are filed with the county clerk as required by law. It seems to have been contemplated by the law-makers that the acts prescribed to be performed by the two sections of the law which we have just noticed must precede the commencement of the existence of the corporation as an organization.

"In this state the filing of articles of incorporation with the county clerk is a condition precedent to the existence of any corporate franchise. The law and the articles so filed, taken together, are considered in the nature of a grant from the state, and constitute the charter of the company," (*Abbott v. Omaha Smelting Co.*, 4 Neb., 416,) and in the body of the opinion in that case is the following: "I think, in order to establish such a corporation, it is neces-

sary to show user of a corporate franchise by an association of persons, though the organization may be so defective as to render the franchise wholly invalid in a proceeding against it by the state; or, in other words, it is necessary to show the existence of a charter, or some law under which the assumed powers are claimed to be conferred, and the user of the franchise claimed under such charter or law. In *Buffalo & A. R. Co v. Cary*, 26 N. Y., 77, it is said that 'If the papers filed by which the corporation is sought to be created, are colorable, but so defective that, in a proceeding on the part of the state against it, it would for that reason be dissolved, yet, by acts of user under such organization, it becomes a corporation *de facto*, and no advantage can be taken of such defect in its constitution, collaterally, by any person.'" In the case at bar the conditions precedent had been performed, and there had been a user of the charter thus acquired, for eight or nine years before the occurrences out of which this action arose, and in her contracts with the bank at that time unquestionably the plaintiff dealt with it as a corporation, fully believing it to be such and relying upon the corporation to pay the indebtedness created in her favor by the transactions, and without a thought or expectation of the stockholders being or becoming personally or individually bound thereby or any partnership liability arising therefrom, and she cannot now be heard to say that she made different contracts, with the defendants as partners, and not with the corporation. The defendants did not agree either with her or among themselves to be bound as partners or liable individually. It is just as clear that the plaintiff never intended to contract or supposed she contracted with the stockholders of the bank individually, and to hold the individual members of the company liable personally as partners would not only practically nullify the contracts which were actually made, but would in effect create and enforce new and different contracts which were never contemplated by the

parties. "A very early case involving this principle is the English case of *Henriques v. Dutch West India Co.*, 2 Ld. Raymond [Eng.], 1535, decided about 1730, in which it was held that 'where an action is brought by a corporation they need not show how they were incorporated, for if the name is proper for a corporation the name argues a corporation, and that the plaintiffs were estopped by their recognition to say there was no such company.'" (27 Am. Law Rev., 211.)

In *Society Perun v. Cleveland*, 43 O. St., 481, in the opinion written by Owen, J., it is said: "The theory that a *de facto* corporation has no real existence, that it is a mere phantom, to be invoked only by that rule of estoppel which forbids a party who has dealt with a pretended corporation to deny its corporate existence, has no foundation, either in reason or authority. A *de facto* corporation is a reality. It has an actual and substantial legal existence. It is, as the term implies, a corporation. * * * Where it * * * has been reputed and dealt with as a duly incorporated body, and valuable rights and interests have been acquired and transferred by it, no substantial reason is suggested why its corporate existence, in a suit involving such transactions, should be subject to attack by any other party than the state, and then only when it is called upon in a direct proceeding for that purpose, to show by what authority it assumes to be a corporation."

In the case of *Gartside Coal Co. v. Maxwell*, 22 Fed. Rep., 197, it was held: "Where persons, supposing in good faith that they are incorporated and are stockholders in a valid corporation, do business as a corporation for a series of years, without the corporate existence being challenged by the state, parties who deal with the company as a corporation cannot hold the stockholders personally liable in case they afterwards discover that the company was not validly incorporated in consequence of some defect or irregularity in the proceedings of the supposed incorporators."

There is no doubt that the state may attack the legality of the existence of any *de facto* corporation by commencing an action with that end in view against its individual members, and oust them from any user of corporate rights. But persons who have contracted with a *de facto* corporation (for such was this bank), as did the plaintiff, and thus recognize and acknowledge its existence as a corporation, may not afterward be heard to deny its corporate capacity, and as to such person or persons, it may be said to be as if it were a corporation *de jure*. We think this doctrine is supported by the greatest weight of authority. (*Globe Publishing Co. v. State Bank of Nebraska*, 41 Neb., 175; *Trumbull County Mutual Fire Ins. Co. v. Horner*, 17 O., 407; *De Groff v. American Thread Co.*, 21 N. Y., 124; *Hackensack Water Co. v. De Kay*, 36 N. J. Eq., 548; *Newburg Petroleum Co. v. Weare*, 27 O. St., 352; *Fresno Canal & Irrigation Co. v. Warner*, 14 Pac. Rep. [Cal.], 37, and cases cited in note; *Greenbrier Lumber Co. v. Ward*, 3 S. E. Rep. [W. Va.], 227, and cases cited in note; *Fay v. Noble*, 7 Cush. [Mass.] 188; *Butchers' & Drovers' Bank v. McDonald*, 130 Mass., 264; *Stafford Nat. Bank v. Palmer*, 47 Conn., 443; *Commissioners of Douglas County v. Bolles*, 94 U. S., 104.)

Having reached this conclusion, it is clear that the plaintiff could not recover in this case against the defendants on the grounds that they were an unincorporated association, or partnership, and we shall now pass to the second branch of the suit, *i. e.*, that the defendants were personally liable because of the failure to comply with certain requirements with respect to the formation of the company. The section of the statutes which it is claimed established the liability is as follows: "If any corporation fail to comply substantially with the provisions of this subdivision, in relation to giving notice and other requisitions of organization, the property of all the stockholders shall be liable for the corporate debts." (Sec. 139, ch. 16, Compiled Statutes, 1887.) In the por-

tion of our law relating to corporations and their organization and creation, under which the defendants formed the company in this case, are several provisions, in which are stated certain things which must be done by a corporation, such as "notice must be published in some newspaper near the principal place of business for four weeks," and "a copy of the by-laws of the corporation, and the names of all the officers appended thereto, must be posted in some conspicuous place, at the place of doing business, subject to public inspection," and some others, the performance of each of which by the bank was negatived in the pleadings of the plaintiff in this action. These, while essential and necessary to be complied with in order to constitute the association of persons a corporation *de jure*, are none of them conditions precedent to the institution of business by the body corporate, and the neglect to comply with them, or either of them, would not entail upon the stockholders any further or special liability other than attached to them by reason of being stockholders, in the absence of statutory provisions fixing a liability for such non-compliance. If the conditions precedent to user of the corporate privileges and powers had not been fulfilled and a contract was made, the partnership or individual liability would be created, but after their fulfillment and user of the charter thus acquired, in the absence of statutory enactment providing for a liability on non-performance of these other and further requirements essential to establish a technical corporation *de jure*, none other than the regular liability of stockholders would exist. This being true, then the liability created by section 139, in so far as it relates and is given for the reason of a lack of the doing by the corporation of those things which were required of it to perfect its organization as a corporation *de jure*, and which were subsequent in point of time to its commencement of business and its right to so do by virtue of all conditions precedent having been performed, is not an enactment of a

liability which before existed or the common law liability, but is additional and entirely statutory in both origin and existence, and we have no doubt that this section of the statute, to the extent of its provisions, destroys the rule which we have discovered to be so prevalent and allows a person to whom a corporation is indebted to make what we think can scarcely be called a collateral attack upon the corporate existence of the organization but a recovery of a corporate debt in the manner and to the extent therein set forth, because of the omission to perform a duty or duties required. If this be true, then the question arises, is the liability contractual or penal? In a note to the case of *Cochran v. Weichers*, 2 Am. R. R. & Corp. Rep. [N. Y.], 382, we find the following quotation from section 908, 2 Morawetz, Corporations: "The statutes imposing this liability establish a new rule of private right,—a rule which, although unknown to the common law, may be founded on sound principles of justice and expediency. The only reason why this liability is called penal appears to be that it does not exist at common law, and is neither created by contract nor given as compensation for a direct and immediate wrong done by the directors to the creditors of the company." And in the same note on page 384 of the report cited, under the head of "Criterion for determining whether such statutes are penal or otherwise," it is stated: "It cannot be denied that a liability which is imposed upon a person as a consequence of the doing or omission of an act and which is not measured by any injury flowing from the act or omission, is in the nature of a punishment. A statute, therefore, which imposes such a liability does, in effect, inflict a penalty and is of a penal character. 'It is the effect, not the form, of the statute that is to be considered,' says the supreme court of Illinois, 'and when its object is clearly to inflict a punishment on a party for violating it—i. e., doing what is prohibited or failing to do what is commanded to be done—it is penal in its character,

and the circumstance that, in punishing, a remedy is likewise afforded to those having an interest in the observance of the statute, is unimportant.' (*Diversey v. Smith*, 103 Ill., 378, 390.) * * * But, as we have already said, it is well settled by authority that certain statutes imposing upon stockholders or officers of a corporation a liability for the corporate debts are to be classed as penal statutes, with the same consequences as though they were penal in the strict sense of the term. So far as we are aware, all such statutes may be divided into two classes, those under which the liability is incurred as a necessary consequence of becoming a stockholder in the corporation, and those under which the liability is incurred only as the consequence of doing or omitting some act specified in the statute. In the former class the liability partakes of the nature of a contract, to which the stockholder assents; in the latter, of the nature of a punishment. There is no logical basis for making any distinction between different statutes of the latter class. They differ in form and degree, but in substance and effect they are the same, and, if any are classed as penal statutes, all should be." Measured by these rules, which we believe to be correct, the section of our statutes under consideration (139) must be classed as penal. The liability given by sections 136 and 139 may be regarded in the nature of a penalty. (*White v. Blum*, 4 Neb., 563.) Section 139 was repealed by an act approved April 6, 1891, during the pendency of this action, and, as a general rule, the right to action given by it being one conferred solely by the statute, and penal, and not having been reduced to judgment before the repeal, the remedy would be abated or blotted out by such repeal. (*Bennet v. Hargus*, 1 Neb., 419; *Globe Publishing Co. v. State Bank*, *supra*, and cases cited; *Carr v. Risher*, 50 Hun [N. Y.], 147; *Union Iron Co. v. Pierce*, 4 Biss. [U. S.], 327.)

The remedy claimed in what we have designated the third branch of the case was afforded by the provision of

section 136 of chapter 16 of the statutes relating to corporations, as it existed at the time this suit was commenced. This was also repealed by the act approved April 6, 1891, during the pendency of the cause, and the remedy thereby afforded, according to the general rule, was destroyed. This section 136 was determined to be penal by *Globe Publishing Co. v. State Bank*, *supra*, and its unconditional repeal to be an abatement of the liability therein fixed. There can be no doubt that, when viewed in the light of the authorities above, the repeal of the two sections quoted would carry with it all actions then pending, or rights of action accrued to any persons by virtue of said sections and not reduced to judgment; but it is insisted by counsel for plaintiff in error that this repeal did not so operate, for the reason that the act by which their repeal was affected was obnoxious to the provisions of section 11, article 3, of the constitution, wherein it is provided that no bill shall contain more than one subject, and the same shall be clearly expressed in its title; that the amending and repealing act of 1891 was, in the substance of its provisions, broader than the objects expressed in its title. The title of the act of 1891 is as follows: "An act to amend section one hundred thirty-six (136) and section one hundred thirty-nine (139) of chapter sixteen (16) of the Compiled Statutes of 1889, and to repeal said original sections." (See Session Laws, 1891, p. 198.) Section 3 of the act contained the repealing clause and stated: "That said original sections one hundred thirty-six (136) and one hundred thirty-nine (139) be and the same are hereby repealed." Section 4 was the emergency clause, but seems to have been made to serve a dual purpose; *i. e.*, to provide that the act take effect immediately after its passage and approval and also to render its provisions applicable to any cause pending or to be instituted. It reads: "Whereas an emergency exists, this act shall take effect from and after its passage and approval, and shall be held and taken to apply in any case now pend-

ing or hereafter brought in any court in this state. Approved April 6, 1891." Judge Cooley, in his work on Constitutional Limitations (5th ed., p. 173), gives as some of the purposes of the provisions in constitutions in regard to titles of laws (for it is found in the constitutions of a large number of the states of the Union with some slight and immaterial variations, mainly in the wording; the general scope, spirit, and intent being the same in all) the following: "To prevent surprise or fraud upon the legislature by means of provisions in bills, of which the titles gave no intimation, and which might, therefore, be overlooked and carelessly and unintentionally adopted. To fairly apprise the people through such publication of legislative proceedings as is usually made, of the subjects of legislation that are being considered, in order that they may have opportunity of being heard thereon by petition or otherwise, if they shall so desire." Judge Gardiner of New York says: "The purpose of the sixteenth section was that neither the members of the legislature nor the public should be misled by the title." (*Sun Mutual Ins. Co. v. Mayor of City of New York*, 8 N. Y., 241.)

In order to more fully comprehend the matter under discussion it is proper here to notice another portion of our statutes. Section 2 of chapter 88, Compiled Statutes, 1893, which was passed and took effect during 1873, is as follows: "Whenever a statute shall be repealed, such repeal shall in no manner affect pending actions founded thereon, nor causes of actions not in suit that accrued prior to any such repeal, except as may be provided in such repealing statute." "The legislature has power to pass a general saving statute, which shall have the force and effect to save rights and remedies, except where the repealing statute itself shows that it was not the intention of the legislature that such rights and remedies should be saved. Though one legislature cannot bind future legislatures and each can make its laws prevail against any that exist, and its inten-

tion in that regard will be law, yet, as all legislatures are presumed to proceed with a knowledge of existing laws, they may properly be deemed to legislate with such provisions of a general nature in view." (Sutherland, Statutory Construction, section 226, and cases cited.) The general saving clause of our statute would have saved all actions pending under the provisions of the sections repealed, or causes of action not in suit, that accrued prior to the passage of the repealing act, if it had not been expressed in or clearly shown by the statute of 1891, which repealed sections 136 and 139, that it was not the purpose of the legislature that such pending actions and those accrued, but not in suit, should be preserved. (*Gilleland v. Schuyler*, 9 Kan., 569; *State v. Boyle*, 10 Kan., 113.) Our legislature did state in the act of 1891, by which the sections under consideration were repealed, their intention that it should apply to cases pending, or afterward brought, and the only question for us to determine at the present time is, whether or not the statements in the title included this object of the act as it is contended they must, in order to free the statute from any objectionable quality under the provision of the constitution invoked by counsel for plaintiff in error, and upon which the argument that the act is unconstitutional is based. It is a well settled rule that in order to justify a court in pronouncing a statute unconstitutional, it must clearly appear that it is so, and unless the act of 1891, or the portion of it which prevented the operation of the general saving clause of our law, was clearly within the mischief sought to be prevented by the constitutional provision, it must be upheld. While the title to an act of the legislature should fairly reflect the elements of the subject of the act, it need not be made an index to all of them that are connected with and incident to such subject. We think the portion of the act in question was sufficiently connected with and subsidiary to the main purpose of the law to bring it within the scope of

such purpose, and to make it germane to the subject-matter of the act; and if so, it was sufficiently expressed in the title. Moreover, we think the sections of chapter 88, *supra*, of which section 2 contained the saving clause, which were passed under the following title: "An act concerning the enacting and repealing of statutes," may be styled (and not inaptly), as were some similar provisions in Kansas, "A set of *quasi*-legislative by-laws," and as they are continually and generally in force and known, or presumed to be known, by the legislator and the public at all times, they could not be misled by the fact that such words were used in the body of the repealing act as made a repeal operative as to pending actions or accrued rights of action, without a specific statement in the title of the act that it would contain such a sentence. Furthermore, the saving clause embodies the authorization for the introduction of a statement in any repealing act which will destroy any effect the general saving clause would otherwise have, wherein it reads, "except as may be provided in such repealing statute," and it seems no more necessary that the appearance of such a statement in the repealing statute should be announced by its title than that the act will contain an emergency clause or provision as to the time it will take effect should be so announced. We conclude that the act passed by the legislature and approved April 16, 1891, entitled "An act to amend section 136 and section 139 of chapter 16, Compiled Statutes, 1889," is not unconstitutional for the reason urged by counsel.

In the judicial district in which the trial of this case was heard there were two judges, one of them (Judge Bush) heard the arguments on demurrers to the petition and overruled them. The trial was conducted by Judge Babcock, the other judge of the district. At the commencement of the introduction of the testimony the defendants objected to the reception of any evidence, on the ground that the petition did not state a cause of action. This was overruled,

and properly so, in strict compliance with the rule announced by the court in *Marvin v. Weider*, 31 Neb., 774, in which it was held: "In a district where there are two judges, a demurrer to an amended petition was overruled by Judge B. and leave given the defendant to answer, which he did. Afterwards the cause came on for trial before Judge A., who sustained an objection to the introduction of any evidence, on the ground that the petition failed to state a cause of action. *Held*, Error. That the ruling of one judge upon a matter directly involved in the case is binding upon the other, unless for cause it is set aside." In the case at bar it appears that after the evidence was closed, and after a portion of the arguments to the jury had been made, the jury were instructed to return a verdict for defendants, as the pleadings, the evidence, and the law would not sustain a verdict against them or any of them. To this the attorney for plaintiff excepted and assigned it as error, arguing that it was holding that the plaintiff had no cause of action, and in effect sustaining a general demurrer to the petition and reversing the ruling of Judge Bush, who overruled such a demurrer, and was contrary to the rule as stated in *Marvin v. Weider*, *supra*. With this we cannot agree. Another element entered into the consideration of the case by Judge Babcock, viz., the evidence, and we think it was proper and his duty, if, in view of the pleadings, the evidence, and the law applicable thereto, a verdict for plaintiff could not be sustained, to direct the jury to return a verdict as he did, and it was no violation of the rule expressed in *Marvin v. Weider*, invoked by counsel for plaintiff.

It appears that after the close of the testimony and some arguments of counsel the trial judge announced that it was his intention to instruct the jury to the effect as hereinbefore quoted. Counsel for plaintiff then made a motion by which he asked to be allowed to amend the petition and state therein specifically the insolvency of the bank and its

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continuance in business after becoming so, and fraud in inducing the plaintiff to deposit her money therein. This motion the trial court overruled, and his action in refusing to allow such amendment is one of the errors assigned in the petition. The provisions of our Code in regard to amendments are very broad and liberal, and this court has announced repeatedly that they must be construed so as to give full operation to such liberal spirit and intent. The petition in this case was, as we have before stated, one to recover upon the contract liability of parties composing an alleged unincorporated association or partnership or upon an alleged twofold statutory liability of the stockholders of a corporation, and after trial of the issues to a jury, and it becoming apparent from the statements of the trial judge that there could be no recovery, leave was asked to so amend the petition as to make the right to recover sound in fraud; not to make the pleading conform to the evidence, for the court had, and we think correctly, upon objection being interposed to this class of testimony when offered, excluded it. Amendments in furtherance of justice should always be allowed, but whether they shall be permitted or not rests largely in the discretion of the court, and this court will not reverse a case for the refusal to allow amendments unless it appears there has been an abuse of such discretion, and we do not think there was any such abuse in refusing to allow the amendment in this case. (*Hedges v. Roach*, 16 Neb., 674; *Clarke v. Omaha & S. W. R. Co.*, 5 Neb., 318.) It follows from the views herein expressed that the judgment of the district court is

AFFIRMED.

WILSON HOXIE ET AL., APPELLANTS, V. BARRETT
SCOTT, TREASURER, ET AL., APPELLEES.

FILED MAY 22, 1895. No. 5007.

Township Bonds: VALIDITY OF ELECTION: JURISDICTION OF COUNTY COMMISSIONERS. Under section 14, chapter 45, Compiled Statutes, it is necessary, to confer jurisdiction upon county commissioners to order the holding of an election on a proposition to vote bonds by a township in aid of a work of internal improvement, that a petition should be presented to such commissioners signed by not less than fifty freeholders of such township.

APPEAL from the district court of Holt county. Heard below before CRITES, J.

H. E. Murphy, for appellants.

Seevers & Seevers, M. F. Harrington, and E. W. Adams, contra.

RYAN, C.

The appellants, by their petition filed in the office of the clerk of the district court of Holt county, sought to enjoin the collection from themselves of certain taxes levied to pay upon the interest and a part of the principal of certain bonds issued for Gratton township, in Holt county, by the authorities of said county. These bonds, thirty-six in number, for \$1,000 each, were issued August 1, 1890, to the Nebraska & Western Railway Company, or bearer. The facts upon which the cause was determined in favor of the appellees were agreed upon and stated in a written stipulation signed by both plaintiffs and defendants. There seems to be some reliance by appellees upon the conceded fact that before the maturity of the first coupon which fell due these bonds were sold and transferred by the

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railroad company to purchasers who bought with only such notice as by the records and the law was of necessity imputable to them. If the status of these purchasers is such that the irregularity hereinafter referred to could not affect their rights as *bona fide* holders of the above bonds, our conclusion will in no way conclude them. If, on the other hand, the result must be such that the validity of the bonds for any purpose, and by whomsoever held, shall of necessity be declared impossible, the question of purchase of these bonds in good faith may incidentally become one of little or no practical importance. We shall not assume to pass upon the rights of holders of the bonds as *bona fide* purchasers, because these parties are not in court. The proposition upon which this appeal must be determined must be considered as though there had been no sale of the bonds by the railroad company, for, under the stipulation of facts which must govern, this is the only proper subject of inquiry. The following language is quoted from this stipulation of facts: "It is admitted by the defendants in this case that the fifty-two names signed to the petition requesting the county board to submit to the electors of Gratton township the proposition to issue these bonds," and that "only thirty-five of said fifty-two persons were actually freeholders in Gratton township," etc. It is not perceived why the word "actually" was used with the word freeholders, for its effect was not to qualify that descriptive term. This is especially true in view of the rule that "if taxes are to be imposed upon the whole body of taxpayers by a vote of a certain proportion of them for the purpose, not of exercising any legitimate function of government, but solely for the purpose of making a gift in aid of an enterprise *quasi-public* in its nature, but still of a business character, it is the duty of courts to see that such power is not abused; that the donees bring themselves within the strict terms of the grant, and that the donors receive precisely what they

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bargain for." (*Nash v. Baker*, 40 Neb., 294.) Our concern now is with that part of the stipulation in which the defendants, in effect, conceded that only thirty-five signers of the petition for the election, pursuant to which the bonds were issued, were freeholders. It is required by the provisions of section 14, chapter 45, Compiled Statutes, that the petition presented to the county commissioners for an election to determine whether or not bonds shall be issued in aid of a work of internal improvement must be signed by not less than fifty freeholders of such township. The want of jurisdiction of the county commissioners and other officers clothed with like powers, with respect to similar petitions, to act upon the petition of less than fifty freeholders, or of a certain proportion of qualified electors, is no longer a debatable question in this state. (*State v. School District*, 10 Neb., 544; *State v. School District*, 13 Neb., 82; *Orchard v. School District*, 14 Neb., 378; *State v. Babcock*, 21 Neb., 187; *Wullenwaber v. Dunnigan*, 30 Neb., 877; *Fullerton v. School District*, 41 Neb., 593.) As the county commissioners had presented to them no petition upon which they had jurisdiction to order an election, the bonds were issued without authority of law. The judgment of the district court is therefore

REVERSED.

WINFIELD S. ATWOOD ET AL. V. MARY A. ATWOOD.

FILED MAY 22, 1895. No. 5992.

Partition: FINAL ORDER: REVIEW. In the petition of a widow the prayer was for judgment confirming her share in, and the partition of, certain real estate owned by her deceased husband, and that if division of such lands could not be made in kind between herself and his four children, a sale should be ordered and the proceeds thereof divided according to the respective

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rights of the parties. A demurrer having been sustained to an answer, the record merely thereafter reciting "judgment of a partition as prayed for in the petition," is held not to disclose a final judgment.

ERROR from the district court of Hitchcock county.
Tried below before WELTY, J.

Pound & Burr and *L. H. Blackledge*, for plaintiffs in error.

J. W. Cole, contra.

RYAN, C.

This action for petition was brought by the defendant in error in the district court of Hitchcock county against the plaintiffs in error, who, as children of the deceased husband of the defendant in error, were alleged to hold undivided shares in the real estate of which their father died seized. There was filed a demurrer to an answer to this petition, which was sustained, whereupon the record recites there was "judgment of partition as prayed for in the petition." As the above quoted language was all that by any construction could be claimed to amount to a final judgment, it is important to consider what in fact was the prayer of the petition therein contemplated. It was as follows: "This plaintiff therefore prays that judgment may be entered confirming her share of said estate, as set forth in the foregoing petition, and that partition of said described lands may be had according to the respective rights of the parties interested therein, or, if the same cannot be equitably divided, that said premises may be sold and the proceeds thereof divided between the parties according to their respective rights, and that plaintiff may have all other proper and equitable relief." The order of "judgment as prayed for in the petition" left still undetermined what were the rights of the respective parties,

and whether or not a division could be made without a sale of the entire property, and until the settlement of these questions, at least, it could not be claimed that there had been rendered a final judgment. This error proceeding is therefore

DISMISSED.

CITIZENS STATE BANK OF CHADRON, APPELLANT, v.
WILLIS F. BELLANGEE ET AL., APPELLEES.

FILED MAY 22, 1895. No. 5966.

Chattel Mortgages: OWNERSHIP: REVIEW: SUFFICIENCY OF EVIDENCE. This appeal involves only questions of fact, and, upon careful consideration of all the evidence, the judgment appealed from is found fully sustained by the proofs.

APPEAL from the district court of Dawes county. Heard below before KINKAID, J.

C. H. Bane and D. B. Jenckes, for appellant.

Spargur & Fisher, contra.

RYAN, C.

Under and by virtue of a chattel mortgage made to plaintiff, the Citizens State Bank of Chadron, by Willis F. Bellangee and Grant Bellangee, the said mortgagee replevied from the possession of Harvey L. Cornwell twenty-seven head of cattle. Originally, Mr. Cornwell had shipped in 1887 to James L. Bellangee a larger number of cattle than above named, to be by James kept and cared for on a timber culture claim held by Cornwell in Dawes county. The cattle replevied were a part of those originally sent and their increase. Willis F., Grant, and James

L. Bellangee were brothers; their sister was the wife of Harvey L. Cornwell. While James was breaking out and farming the timber culture claim and caring for the stock under the above mentioned arrangement with Cornwell, Willis F. and Grant were in his employ. It would seem from the evidence that the two brothers last named took advantage of the absence of James to lay claim to the cattle in dispute as purchasers from Cornwell, and by their apparent sole possession their claim was rendered very plausible. The cattle were originally branded with the letters "H. C." and, so described, were originally mortgaged by Willis F. and Grant. Afterwards, they represented to Mr. McFadden, cashier of the Citizens State Bank aforesaid, that from "H. C." they had changed their brand to "F. X. E.," and by reference to this distinctive brand the cattle were described in the mortgage then made under which they were replevied by the bank. There was also brought by the bank against Willis F. and Grant Bellangee and Harvey L. Cornwell, in the district court of Dawes county, an action for the foreclosure of its last mentioned mortgage and for other equitable relief in that connection. The replevin action and that for equitable relief were consolidated by agreement of parties and submitted to the court as one action on all the issues involved. There was judgment in favor of defendant Cornwell, for the dismissal of plaintiff's action with costs, from which judgment plaintiff appeals.

From the necessities of the case, the only matters of evidence available to plaintiff were the statements of Willis F. and Grant Bellangee as to their acquisition of title by purchase from Cornwell, and their possession under claim of ownership. As the whereabouts of these two brothers could not be learned, their testimony was not procured by either party. There was an overwhelming amount of evidence by which it was shown how, when, and of whom Cornwell purchased, the fact that he shipped

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the cattle purchased to Chadron, and that as an evidence of his ownership two initial letters of his name, "H" and "C," were branded upon each animal, and that the branding with the letters "F. X. E." was not known to him. There was involved no question other than of fact in the controversy, and as in the light of the evidence the judgment of the district court was clearly right, it is

AFFIRMED.

WILLIAM G. BALL V. SWEN NELSON.

FILED MAY 22, 1895. No. 6527.

Review: TRANSCRIPT. When there are alleged no errors, except such as depend upon the proposition that a demurrer was well taken, the absence of such demurrer from the transcript precludes a consideration of the several assignments of the petition in error.

ERROR from the district court of Harlan county. Tried below before BEALL, J.

C. C. Flansburg, for plaintiff in error.

John Everson, *contra*.

RYAN, C.

The record in this case contains a petition entitled "Sven Nelson v. William G. Ball," in which the plaintiff's cause of action alleged was the failure of the Nebraska & Kansas Farm Loan Company to pay to plaintiff the sum of \$413.50 due him; the failure of said Nebraska corporation, for more than a year anterior to the incurring of said debt, to publish the notice of its indebtedness required by section 136, chapter 16, of the Com-

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piled Statutes previous to the repeal of said section in 1891, and the fact alleged that the defendant was a stockholder in said corporation during its said default of publication as well as of payment. The petition closed with a prayer for a personal judgment against William G. Ball in the amount above named. By affidavit filed in this case it was shown that defendant was a non-resident of this state, and that in the hands of one C. C. Flansburg he had moneys, and that therefore said Flansburg was owing said defendant. There was served upon Mr. Flansburg a notice of garnishment, requiring him to appear in the district court of Harlan county and answer as garnishee on November 1, 1892. We do not find in the record any answer of this garnishee. In one part of the transcript it is recited that a demurrer was overruled, to which ruling the defendant excepted; afterwards in the record, under proceedings of the same date as that whereon the ruling referred to was made, it is recited that the cause came on to be heard on demurrer, which was overruled, and that the garnishee excepted and refused to plead further, whereupon the court entered judgment against the defendant for the sum of \$200. From the fact that one of these entries was made in the trial docket and the other in the journal of the same date, it is presumable that they described the same transaction. It is quite likely, too, that the first was simply a memorandum made by the presiding judge, from which the journal entry was prepared. If this is a correct surmise, there could only be considered the journal entry (*Brown v. Ritter*, 41 Neb., 52), and it would necessarily result that we could prosecute no further inquiry, for the defendant could not avail himself of an exception not taken by a party to the action. It is possible that the demurrer was filed for the defendant, but neither of this nor of the grounds of the demurrer have we any means of information, as it was not made a part of the transcript. Under these cir-

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cumstances we cannot presume that the district court erred in the ruling made upon whatever demurrer was considered, and as the entire argument of plaintiff in error was directed to this proposition, and no other is presented by the record, the judgment of the district court is

AFFIRMED.

ANDREW P. LEACH ET AL. V. BENJAMIN RENWALD.

FILED MAY 22, 1895. No. 6021.

Necessity of Ruling on Motion for New Trial: REVIEW.

No reversal of a judgment can be had where the errors assigned are solely such as are claimed to have occurred during the trial and in the rendition of the judgment against plaintiff in error, if in the district court a ruling upon a motion for a new trial is not shown to have been made.

ERROR from the district court of Hitchcock county.
Tried below before WELTY, J.

Woolman & Strout, for plaintiffs in error.

George E. Banks, contra.

RYAN, C.

This case was tried without the intervention of a jury and judgment was rendered in favor of the plaintiff by the district court of Hitchcock county for the sum of \$21.65 and costs. The defendant now seeks a reversal of this judgment against him, and in his petition in error assigns errors occurring at the trial and in rendering judgment for plaintiff in view of the law and evidence. There was filed a motion for a new trial in the district court, upon which the record discloses no ruling. In *Jones v. Hayes*, 36 Neb.,

Powers v. Budy.

526, this court held that a review in error of the proceedings of the district court could not be had unless therein had been presented and passed upon a motion for a new trial. This rule has in its support the following cases: *Cropsey v. Wiggernhorn*, 3 Neb., 108; *Gibson v. Arnold*, 5 Neb., 186; *Lichty v. Clark*, 10 Neb., 472; *Smith v. Spaulding*, 34 Neb., 128; *Shrimpton v. King*, 39 Neb., 779; *Brown v. Ritner*, 41 Neb., 52; *Gordon v. Little*, 41 Neb., 250. The judgment of the district court is

AFFIRMED.

CHESTER POWERS ET AL., APPELLANTS, V. ERNEST BUDY
ET AL., APPELLEES.

FILED MAY 22, 1895. No. 6327.

1. **Religious Societies: REGULARITY OF ECCLESIASTICAL PROCEEDINGS: COURTS: REVIEW.** Courts which have no ecclesiastical jurisdiction will neither review nor revise the proceedings or judgments of church tribunals where therein are involved only questions of church discipline. Following *Pounder v. Ash*, 44 Neb., 672.
2. ———: ———: ———: ———. There exists no power in courts of equity to supply lacking remedies for the regulation of the affairs of a church organization within itself. As a voluntary association it alone has the power, and, if necessary, must itself provide means for the adjustment of all matters with respect to its internal polity which do not affect the rights of the citizen or the jurisdiction of the state.

APPEAL from the district court of Adams county. Heard below before BEALL, J.

Ed. P. Smith, W. P. McCreary, E. B. Esher, and Ritchie & Esher, for appellants.

W. A. Bergstresser and A. H. Bowen, contra.

RYAN, C.

The appellants as plaintiffs were denied the relief by them prayed in the district court of Adams county. The allegations of their petition pertinent to our review of the decree complained of on appeal were that Shilo church at Kenesaw, in the aforesaid county, was an organization created under the laws of Nebraska in conformity with the rules and government of the Evangelical Association of North America; that said Shilo church had acquired two certain tracts of real property, on one of which was a church building, and the other was used for a parsonage; that one of the plaintiffs, Conrad Schwab, at the time of the filing of the petition, and long before, was, and had been, an ordained minister in said Evangelical Association and a member of the Platte River conference; that at the annual conference of the Platte River Conference District in 1892, presided over by S. C. Breyfogle, an acting bishop in said association, the aforesaid Conrad Schwab was duly elected and thereupon was duly assigned to preach and preside over said Shilo church. It was charged in the petition that notwithstanding the facts stated, the defendants wrongfully refused to recognize the pastoral authority of Rev. Conrad Schwab, and unless restrained would eject him from the aforesaid church property. While this language would imply that Rev. Conrad Schwab was in the possession of said church property, this is rendered perhaps more than doubtful by the following averments found in the petition, to-wit: "Plaintiffs state that the defendants were at one time members of said Evangelical Association, but that they are now in a state of rebellion against the same, against the officers thereof, and refuse to be governed by the laws of said Evangelical Association as set forth in the discipline thereof; that they refuse to recognize any of the acts of the annual conference herein mentioned; refuse to accept the minister thereat assigned, and without

any right whatever have placed in the pulpit of said church the defendant Samuel H. Dunkleberger, who is also in a state of rebellion against the said association, its officers and members, who has no right whatever to preach in said church, or preside over the congregation of said association thereat." Following the above language the averments of the petition were, in effect, that the defendants were seeking to obtain possession of the parsonage building and eject Rev. Conrad Schwab therefrom; that the defendants, with all their power, were trying to destroy the Evangelical Association, teaching doctrines and ideas contrary thereto—inciting to rebellion against said association and authority certain of its members, and to accomplish said purposes were using the property of Shilo church and diverting said property from its proper uses. The prayer of the petition was for an injunction "restraining the defendants from doing, causing to be done, or in any manner counseling others to do, each and every of the wrongs herein complained of," and for general equitable relief. The defendants, with zeal equal to that displayed by plaintiffs, answered to the extent of twenty-one pages of type-written matter, supplemented with eleven like pages of exhibits. In this answer it was asserted that neither of plaintiffs was a member of Shilo church aforesaid; that Conrad Schwab had never been a legally appointed, empowered, or qualified minister of the church described in the petition and had never been appointed by any legal or other conference. It is quite unnecessary to further summarize the contents of the answer, for already it appears that this contest was as to the right of Mr. Schwab as against Mr. Dunkleberger to officiate as pastor of Shilo church. The rival claims of right in this respect are traceable to the dispute which arose in the Evangelical Association of North America concerning the alleged suspension of Bishop Esher by a committee which, over his protest, assumed and exercised jurisdiction,

as it claimed, with the result indicated. Previous to the above final action by the committee, Bishop Esher came to Beaver Crossing, Nebraska, and by virtue of his office of bishop attempted to preside over the annual meeting of the Platte River Conference at that place. This body refused to recognize him as its president, because there then existed charges against him, and, under the provisions of the discipline of the Evangelical Association applicable in cases where no bishop was present, there was elected an elder, who thereupon, with the assent of all present, except Bishop Esher and perhaps one other person, assumed to act as president of this conference, which, among other acts, designated Holdrege as the place for its meeting in 1891. At the meeting held in Holdrege pursuant to above designation, Glenville was selected as the place at which the Platte River Annual Conference should be held in 1892. At this conference at Glenville, Rev. S. H. Dunkleberger was assigned to preach and preside over the congregation at Shilo, and the performance of the duties devolved upon him by this association were those which plaintiffs sought by this action to prevent by injunction. When an elder had been elected president at the annual conference at Beaver Crossing on the assumption that no bishop was present, Bishop Esher protested, and, finding that he was not heeded, withdrew, after denouncing the proceedings as without warrant. In the *Evangelical Messenger*, a journal purporting to be the organ of the above described Evangelical Association, of date February 24, 1891, J. J. Esher, without any official designation, called a meeting of the Platte River Conference for reorganization and for its annual session to be held at Omaha, March 6, 1891. At the meeting thus called Nelson was fixed upon as the place of the annual meeting of the Platte River Conference in the year 1892. It was by this latter convocation that Rev. Conrad Schwab was appointed preacher of said Shilo church, and between this appointee and Rev.

S. H. Dunkleberger trouble at once began, and, though the term of appointment expired in March, 1893, the contest survives in this appeal.

By the pleadings there were presented for determination, *in limine*, the questions whether or not either appointee was a member of the general society known as the Evangelical Association of North America, and whether or not either of the parties litigant was connected therewith or were seceders from and in rebellion against it. If these propositions should be settled in such a manner as to permit of further litigation, the next question presented would be whether or not J. J. Esher was a bishop when the Platte River Annual Conference was held at Beaver Crossing, and if so, what was the effect of the irregularities which in such case must be conceded to have characterized subsequent proceedings. These are questions which must be determined by the proper authorities of the association. While they are insisted upon in this appeal, they are in fact merely incidental to the principal, and probably the only, question which we are asked to decide, and that is, who was the proper preacher to have charge of and preside over Shilo church between a day certain of March, 1892, and a corresponding day in March, 1893?

In *Pounder v. Ashe*, 44 Neb., 672, an opinion has been filed during this term in which it was held that so long as there is no infringement of the rights of a citizen and there is no conflict with the jurisdiction of the state, church associations should be free from the interference of courts where there is drawn in question only the right of such organizations to try and, if need be, expel its members for the violation of a church ordinance or law. It is quite possible that for the final determination of the unhappy controversy, to which this is a mere incident, there exists in the regulations of the Evangelical Association of North America no sufficient provision. This, if it exists, is a deficiency which can be supplied only by the association.

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Courts of equity, while they may supply remedies not available in legal actions, have no jurisdiction to supplement the powers of purely voluntary associations when, through improvidence, they in practice are found inadequate. To concede that voluntary associations cannot govern themselves might present a convincing argument against allowing them at all to exist, but by no means affords a justification for placing them under the guardianship of the state through its courts. The separation of church and state cannot be too thoroughly insisted upon, and the contingency which would justify control by the latter of the affairs of the former is scarcely, if at all, imaginable. The necessity for this independence, as well as its actual existence, have been universally recognized and frequently enforced by the civil tribunals of this country. (*Connitt v. Reformed Protestant Dutch Church*, 4 Lans. [N. Y.], 339; *White Lick Quarterly Meeting of Friends v. White Lick Quarterly Meeting of Friends*, 89 Ind., 136; *Shannon v. Frost*, 3 B. Mon. [Ky.], 253; *Gaff v. Greer*, 88 Ind., 122; *Chase v. Cheney*, 58 Ill., 509; *State v. Farris*, 45 Mo., 183; *Watson v. Jones*, 13 Wall. [U. S.], 679; *Pounder v. Ashe*, 44 Neb., 672.)

The decree appealed from which dissolved the injunction obtained by plaintiffs and denied the relief prayed was justified by the views expressed; and the judgment of the district court is therefore

AFFIRMED.

JAMES H. MCMURTRY V. CELINA B. BLAKE ET AL.

FILED MAY 22, 1895. No. 6147.

Contracts: REFUSAL TO CONVEY LAND: DAMAGES. Where one accepts of a conveyance of real property upon the express condition that it is to be by him conveyed to another, his willful re-

McMurtry v. Blake.

fusal to so convey renders him liable for such damages as shall thereby be caused to the party entitled to receive conveyance, either by expenses of litigation rendered necessary, or from the loss of an opportunity to sell such lands at a good price while conveyance is wrongfully withheld.

ERROR from the district court of Lancaster county. Tried below before TUTTLE, J.

J. R. Webster and Reese & Gilkeson, for plaintiff in error.

Stevens, Love & Cochran, contra.

RYAN, C.

In this case there was in the district court of Lancaster county a judgment in favor of Celina B. Blake, the original plaintiff, against James H. McMurtry for the sum of \$2,774.67 and costs. To reverse this judgment McMurtry prosecutes error to this court. J. R. Webster was joined as a defendant in error for the reason that, sued with McMurtry, there was a verdict in his favor.

In the earlier history of the difficulties out of which this case grew there was delivered an opinion of this court by its then chief justice (*vide Blake v. McMurtry*, 25 Neb., 290), in which most of the essential features of this action were fully described. In argument, it is intimated that this opinion was based upon a radical misconception of the facts contained in the record at that time under consideration. It is very difficult to imagine how we can treat the opinion referred to as less than conclusive of the correctness of every proposition of fact therein stated, for, by consent of all parties, it, together with its entire syllabus, as well as the compendium of the brief of counsel for each side, were read to the jury. At the risk of reiterating what may be found already well stated in the case referred to, a brief statement of the facts will now be attempted. On the 29th day of April, 1878, Wealthy P. Gregory, with her husband, made a mortgage to R. E. Moore on such

part of the north half of the northwest quarter of section 34, township 10 north, range 6 east, 6th P. M., as was then owned by said mortgagors or either of them. By warranty deed of date of April 25, 1872, which was filed for record on the same day, there had been conveyed five acres of the above tract to R. R. Tingley, by whose warranty deed of date and filed for record January 30, 1879, said five-acre tract was conveyed to Hannah L. Tingley. The title of the defendant in error, Celina B. Blake, was by *mesne* conveyances derived from Hannah L. Tingley. R. E. Moore began foreclosure proceedings on his mortgage, in which proceedings Hannah L. Tingley was made a defendant, and on September 12, 1879, she answered, asserting her title. Under a stipulation of the parties a decree was entered in favor of Moore, from which the five-acre tract owned by Celina B. Blake was omitted. On March 26, 1881, R. E. Moore obtained leave to amend his petition and thereon took a decree, June 25, 1881, which included the five-acre parcel owned by Hannah L. Tingley, without notice to or appearance by her, or her representative. To enforce this decree an order of sale, after some years, issued against the entire eighty-acre tract above described. The defendant in error, who had in the meantime become the owner of the Hannah L. Tingley five acres, thereupon caused to be prepared a petition for an injunction against the sale of the parcel of land of which she was now the owner, and secured a temporary order thereon as prayed. F. M. Hall, an attorney of R. E. Moore, to whom was shown the above petition and order, to prevent interference with the proposed sale by the sheriff, thereupon executed the following instrument:

“LINCOLN, NEB., August 10, 1886.

“In consideration that Celina Belle Blake, at my request, has not enjoined the sale of the below described five acres this day, I agree, on confirmation of sale in Moore v. Gregory, to convey and quitclaim to her the five acres de-

scribed as commencing fifty rods south of the northeast corner of the northwest quarter of section 34, township 10 north, range 6 east, thence west forty rods, south twenty rods, east forty rods, north twenty rods to beginning, a part of lands purchased at sale.

F. M. HALL,

"Bidder at Sale."

The entire eighty-acre tract was thereafter purchased by Mr. Hall, but the confirmation of sale was resisted by Wealthy P. Gregory and her husband for the purpose of securing to themselves the benefits of homestead exemptions under the statutes of this state. The resistance on their behalf was conducted by their son, John S. Gregory, Jr., an attorney at law. The manner in which confirmation was finally secured was stated by Mr. Hall thus: "We * * * never did get the sale confirmed at all until after the agreement was made by which I was to deed this whole eighty acres of land to McMurtry, and before I deeded it to McMurtry I cannot say whether the proposition was made by John S. Gregory or McMurtry, but one or the other proposed to me, as a member of our firm, that if I would deed this land to them, after they got a deed to it, they would pay our mortgage, interest, and costs. When that proposition was made I went to General Webster, who represented the parties to this contract to whom I had agreed to deed, and I just laid these facts before him. * * * My understanding both with General Webster and with McMurtry was that my contract would be carried out; that is, if I deeded this land to McMurtry he would convey, according to the terms of my contract with General Webster, to his client. With that understanding I made this deed to McMurtry." In the course of his testimony Mr. Hall said that several times previous to making the deed to McMurtry, Mr. Gregory had offered to pay off the Moore mortgage if witness Hall would turn it over to include the five acres, because he (Gregory) was of the opinion that Mrs. Blake was estopped and concluded

by the foreclosure. This, Mr. Hall said, he declined to do because of his contract with Mrs. Blake.

Mr. McMurtry testified that he owned thirty-one and a quarter acres of the eighty mortgaged to Moore. Further testifying he said: When this sale had been made, which I knew nothing of till after the sale was made, * * * I wished to get my land out of this litigation. I then said to Gregory that I would pay the amount of the R. E. Moore judgment if I could hold my land out of the sale and stop the injunction proceedings. He said if I would take a deed to the land from Mr. Moore and hold it so as to save his mother's homestead and any right he might have, or then might have to this north half of the north-east quarter of 34-10-6, that he would not enjoin or fight the sale of the land at that time. I went and saw Mr. Hall and told Mr. Hall that I would take his place in the contract that he had made exactly as he stated, and would convey this land to Mrs. Blake as soon as the matter could be settled, and in pursuance to that contract I paid Mr. Hall the money for his clients. He told me he would see me later with regard to it. Then General Webster called on me and told me of this contract, and told me what I was doing, and the position I would be in, and said that if I would promise him that I would make no transfer of this five acres of land belonging to Belle Blake and would hold the land subject to any order the court might make on this land that he would consent to this matter. I think this was about the position it was in, and in pursuance of that contract I paid the money—somewhere between \$900 and \$1,200—and took the deed of Mr. Hall to get my land out of the controversy and to hold the other land till I was ordered to deed it by the court.

(Question by General Webster.) And I brought the action for Mrs. Blake immediately?

A. Yes; the same day. I think the papers were served on me before the deed or about the same time the deed

was made to me for the land—I think the same time—the beginning of the suit by Belle Blake against me for the recovery of the land. The only object I had in the matter was to clear the cloud from my own land.

On his cross-examination Mr. McMurtry testified that he never paid particular attention to the suit in the district court or in the supreme court and knew nothing about it—knew nothing about who it belonged to.

Following his statement that his contract was to deed to Mrs. Gregory was the question if it was not also to deed to Mrs. Blake. Mr. McMurtry testified:

No, sir; the contract with Hall was to deed to Mrs. Blake. The contract with Gregory was that I was to deed to Gregory.

Q. The same land?

A. Yes.

Q. That is the position you were in?

A. That is exactly the position I was in. I was between the devil and the deep sea.

In this uncomfortable dilemma Mr. McMurtry voluntarily remained until released by the judgment of this court at the July term, 1888. (*Vide Blake v. McMurtry*, 25 Neb., 290.) The deed from Mr. Hall and wife to McMurtry was dated March 25, 1887. It was then the duty of Mr. McMurtry to convey to Mrs. Blake. There was no excuse possible for his agreement to convey this land to Gregory thereafter in violation of his undertaking to carry out the stipulation of Mr. Hall that conveyance should be made to Mrs. Blake. Instead of conveying to her, however, Mr. McMurtry saw fit to compel Mrs. Blake to resort to legal proceedings to compel what it was his duty to do. By this course he in his own wrong deprived Mrs. Blake of the power to advantageously dispose of the subject-matter over which she was compelled to litigate. This enforced delay was at his own risk, and, as there was evidence showing that Mrs. Blake in expenditures in the

litigation and the loss of opportunities to sell was damaged the full amount of the verdict, the plaintiff in error has no just cause for complaint.

It is urged, however, that by the evidence of Mr. Blake that Sherwin & Sherwin, a firm of real estate agents, had procured a would-be purchaser for the five acres at a high price the plaintiff in error was taken by surprise, and that, if an opportunity had been afforded, he could have contradicted this statement by the evidence of said real estate agents, as shown by their affidavits filed after the trial. It is worthy of note, however, that when Mr. Blake gave the evidence complained of there was no objection to its character, neither was there any attempt to secure a continuance. Not only was this true, but from an affidavit filed by a member of the firm of Sherwin & Sherwin it appears that the contradictory evidence could not have been made very direct or satisfactory. There was also evidence, on the trial, of J. H. Blair, another real estate dealer, that he, while the land was tied up in litigation, had by authority offered the same price for the disputed land as had been stated by Mr. Blake as the offer through Sherwin & Sherwin. Under these circumstances there was no error in refusing a new trial for the purpose of putting in evidence the statements of the individual members of the firm of Sherwin & Sherwin.

There is no criticism of the instructions either given or refused, neither is there any other question presented by the record. The judgment of the district court is

AFFIRMED.

LYSANDER W. TULLEYS, APPELLANT, V. CHARLES B.
KELLER ET AL., APPELLEES.

FILED MAY 22, 1895. No. 7240.

1. **Corporations: OFFICERS: USE OF NAME AS TRUSTEE.** Where the president of a loan company consented that securities in the nature of trust deeds should be made to himself, described as trustee, he thereby gained no right to use such designation to the injury of the company of which he was president and which was in fact the beneficiary named or contemplated in such trust deeds.
2. **Equity Jurisdiction.** One who submits to the determination of a court of equity his claim of a right to employ the designation of himself as trustee to the disadvantage of the beneficiary, and prays the judicial recognition and enforcement of such right, has no cause to complain if such court having taken jurisdiction of the subject-matter for said purpose administers complete relief as between all the parties to such litigation.
3. **Loan Companies: CORPORATE OFFICERS: USE OF NAME AS TRUSTEE.** The facts in this case stated, and held to justify the decree entered in the district court.

APPEAL from the district court of Douglas county.
Heard below before FERGUSON, J.

Breckenridge & Breckenridge, for appellant, cited: *Holden v. New York & Erie Bank*, 72 N. Y., 286; *Myers v. Ross*, 3 Head [Tenn.], 59; *Hart v. Farmers & Merchants Bank*, 33 Vt., 252; *National Security Bank v. Cushman*, 121 Mass., 490; *Bank of New Milford v. Town of New Milford*, 36 Conn., 93; *Central Nat. Bank v. Levin*, 6 Mo. App., 543; *Toll Bridge Co. v. Betsworth*, 30 Conn., 391; *New Hope & Delaware Bridge Co. v. Phenix Bank*, 3 N. Y., 166; *Trenton Banking Co. v. Woodruff*, 1 Green Ch. [N. J.], 128; *Porter v. Bank of Rutland*, 19 Vt., 410; *Fulton Bank v. New York & Sharon Canal Co.*, 4 Paige Ch. [N. Y.], 136; *Mechanics Bank v. Schaumburg*, 38

Mo., 228; *Village of Port Jervis v. First Nat. Bank*, 96 N. Y., 550; *Quincy Coal Co. v. Hood*, 77 Ill., 68; *New England Car Spring Co. v. Union India Rubber Co.*, 4 Blatch. [U. S.], 1.

Charles B. Keller, contra, cited: *Walters v. Anglo-American Mortgage & Trust Co.*, 50 Fed. Rep., 316; *Walker v. Anglo-American Mortgage & Trust Co.*, 72 Hun [N. Y.], 334; *Glass v. Tipton, Tetersburg & Berlin Turnpike Co.*, 32 Ind., 378; *Enewold v. Olsen*, 39 Neb., 59; *Meneely v. Meneely*, 62 N. Y., 427; *Smith v. Plank Road Co.*, 30 Ala., 650; *Probasco v. Bouyon*, 1 Mo. App., 241; *Caswell v. Davis*, 58 N. Y., 223; *Holmes v. Holmes, Booth & Atwood Mfg. Co.*, 37 Conn., 278; *Glenn & Hall Mfg. Co. v. Hall*, 61 N. Y., 226; *Koehler v. Dodge*, 31 Neb., 329; *Fitzgerald v. Fitzgerald & Mallory Construction Co.*, 41 Neb., 374.

RYAN, C.

This action was brought in the district court of Douglas county by appellant against the appellees for an injunction restraining the defendants from interfering with the business of L. W. Tulleys, both as an individual and as trustee. It was likewise sought to prevent defendant's use of the name of L. W. Tulleys and of the name of Burnham, Tulleys & Co. The defendants Keller and Weldon were joined with the Anglo-American Mortgage & Trust Company simply because one, as its attorney at law, and the other, as its manager, was acting in its behalf in the matters of which complaint was made. By its answer, in the nature of a cross-petition, the Anglo-American Mortgage & Trust Company prayed that plaintiff L. W. Tulleys might be enjoined from advertising and doing business as "successor to L. W. Tulleys, trustee," and from interference with the right of such defendant to the use of the designation "L. W. Tulleys, trustee," and that plaintiff

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might be restrained from the use of the above designation of himself in respect to papers, securities, and titles taken by plaintiff for which funds loaned by the mortgage and trust company had been used while plaintiff was president of said defendant. There was also in the said answer a prayer that plaintiff might be enjoined from interfering with said defendant's use of the firm name of Burnham, Tulleys & Co. in respect to commission notes and mortgages which had been taken in the name of said firm, but which in reality belonged to said mortgage and trust company, and that in such cases as plaintiff while president of said mortgage and trust company had appropriated its funds to payments for foreclosing commission mortgages in which L. W. Tulleys as a member of the firm of Burnham, Tulleys & Co. had or claimed an interest. There was also a prayer that a commissioner might be appointed by the court to make such conveyances as should be found necessary in case plaintiff should fail to execute them within such time as should by the court be fixed for that purpose. There was also a prayer for general equitable relief. It is not attempted to set out or epitomize the pleadings, for thereby would be involved much needless repetition. To avoid misapprehension, however, it is perhaps necessary to state that there was in an answer of all the defendants a denial of the averments of the petition, and that, by reply, a like issue was joined upon each of the averments of the answer. On final hearing, the plaintiff was denied relief and the prayer of the mortgage and trust company was for the most part granted. While this case has been pending in this court there has been filed an opinion upon application for an order for an additional supersedeas bond. (*Vide Tulleys v. Keller*, 42 Neb., 788.)

For some time prior to June 1, 1888, the firm of Burnham, Tulleys & Co., of which firm plaintiff was a member, was engaged in loan business, taking only real estate security. Its principal office was at Council Bluffs, Iowa,

where its membership was A. C. Burnham, L. W. Tulleys, and J. N. Brown. It had a branch office at Sioux Falls, South Dakota, where, in addition to the above membership, there was included J. V. McDowell. For such sums as were loaned bonds were taken, payable, principal and interest, to C. K. Hesse. To secure each bond a trust deed of the real property offered as security was required to be executed to "L. W. Tulleys, trustee." Where a commission for effecting a loan was not paid in cash it was secured by a mortgage subject to the above described deed of trust, the firm of Burnham, Tulleys & Co. being named as the mortgagee. Mortgages of this class were throughout this case described as commission or second mortgages. It was claimed by the plaintiff on the argument that the business of Burnham, Tulleys & Co. during the years 1886, 1887, and up to its discontinuance, about June 1, 1888, was very prosperous. This was denied by the defendant. It is difficult from the evidence before us to determine satisfactorily what was, in fact, the financial condition of Burnham, Tulleys & Co. at the date last above mentioned. There is found in the bill of exceptions a letter of Burnham, Tulleys & Co., of date November 13, 1886, addressed to P. L. Johnson at Hastings, Nebraska, in which occurs this language: "We may need \$5,000 to \$10,000 more money from C. B. Nat'l Bank, but, as we have already borrowed there, in order to get a further loan we will have to use different names. If agreeable, send us a note similar to the enclosed, signed by your brother and yourself, but make out the amount on a blank you have in Hastings. We send the enclosed as a sample. It looks better to have two names. We will guaranty the note and hold you harmless as to its payment. Your early attention will oblige," etc. In a letter of Burnham, Tulleys & Co., addressed to A. C. Burnham at his residence, Champaign, Illinois, of date January 17, 1888, there are contained these statements: "We have arranged for a ninety days'

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extension on the \$25,000 note due at the Chemical Nat'l to-day. * * * The frequent calling for papers at the east is materially affecting our business, and, doubtless, in a measure is the reason of calling in of funds. In December we sent back quite a large amount. The business is practically at a standstill, and what we did in December and January will not pay expenses. We deem it advisable to acquaint you with this condition." The extension above arranged with the Chemical National Bank, it will be noted, expired after the middle of April, 1888. Before this extended loan fell due there were sent out circular letters, of which the following is a sample:

"A. C. Burnham. L. W. Tulleys. J. N. Brown.

"OFFICE OF BURNHAM, TULLEYS & CO.,

"COUNCIL BLUFFS, IOWA, April 2, 1888.

"*Alfred Walker & Co., Farm Loans and Real Estate, 85 Orange St., New Haven, Conn.*

"Realizing the advantage of permanence and perpetuity in a business conducted under a corporate form, the American Mortgage & Trust Co. has been organized under the laws of the state of Iowa, to succeed the old and well known firm of Burnham, Tulleys & Co., which has been placing western farm mortgage loans for more than twenty-five years, and has now many millions upon its books. The proposed capital is \$500,000, a large part of which has been taken by ourselves. If it were practicable we should take it all, as from our past experience in the business we feel sure it will be a profitable investment. We offer a limited amount of stock to our friends at par and fifty cents per share. Under our articles of incorporation and the laws of this state the stock is full paid and non-assessable. The company will be under the management of the members of said firm, and will adhere to the same conservative methods which have characterized their past record. It needs no argument to demonstrate the value of our plant or that the stock will pay handsome

dividends. The new form will increase our facilities, both east and west, for a more extended business, and with a larger business will come increased profits. As the amount we have to dispose of is limited, we offer it to all our friends and customers, and subscriptions will be accepted in the order of the priority of their receipt. Subscriptions should be accompanied by twenty-five per cent of the amount subscribed. The balance will be called in between now and June first, as the directors may elect. As soon as the amount to be sold is taken we reserve the right to reject subscriptions in excess."

Almost immediately after the incorporation of the American Mortgage & Trust Company it was found advisable to adopt an additional distinctive designation, and the result was the incorporation of the Anglo-American Mortgage & Trust Company. Neither party questions that this change was simply for the purpose indicated and all concede the substantial identity of these corporations. From the deposition of L. W. Tulleys we learn that up to June 1, 1888, or thereabouts, when the firm of Burnham, Tulleys & Co. was succeeded in business by the corporation last above named, the capital stock of said firm was owned by A. C. Burnham. It is not very clear just what is meant by this statement, but we assume that Burnham alone had advanced the funds necessary for carrying on the business of said firm. For whatever this interest may have been, it was arranged between Mr. Burnham and his partners, Tulleys, Brown, and McDowell, that they should give to him their notes to the amount in the aggregate of \$100,000. There had been earned by the firm of Burnham, Tulleys & Co. about \$140,000, which was evidenced by commission mortgages, book accounts, taxes advanced, and foreclosure expenditures made, etc. Of this amount \$40,000 in par value was the distributive share of A. C. Burnham. When he took the notes of his partners in exchange for the stock of Burnham, Tulleys & Co. they as-

signed their share of the \$140,000 profits above referred to (\$100,000) to Mr. Burnham as collateral security to their aforesaid notes. From the evidence as an entirety, and from the assertion of counsel for appellant that Burnham was worth a million, when he contends that Burnham, Tulleys & Co. were not insolvent, in connection with his failure to mention in that connection what financial standing Burnham's partners had, it is difficult to avoid the conclusion that just at this point of time the only solvent member of the firm of Burnham, Tulleys & Co. went out of the farm loan business. In the contract whereby was assigned the above collaterals it was stipulated between Mr. Burnham and his partners that the commission notes turned out as collateral should remain with Tulleys, Brown, and McDowell for collection without expense to Burnham, and that the said collections should be applied on the notes to which the notes so entrusted were collateral, when the aggregate collections so made amounted to five or ten thousand dollars. By this arrangement there were placed in the hands of Tulleys, Brown, and McDowell assets of the nominal value of almost \$100,000. Of this amount Mr. Tulleys testified that \$66,000 was made up of mortgages, the remainder was composed of tax certificates, notes, etc. In order to make up the even \$100,000 there were required between three and four thousand dollars, of which Mr. Burnham put up his share in cash; his partners made their notes to the Anglo-American Mortgage & Trust Company for their proportion. In this manner, as we understand it, were L. W. Tulleys, J. N. Brown, and J. V. McDowell provided with means wherewith to pay for \$100,000 of the stock of the projected mortgage and trust company. These gentlemen were not satisfied, however, with this \$100,000 subscription. They took stock in addition to the amount of \$100,000 par value and paid for it in the good-will of the firm of Burnham, Tulleys & Co. It is possible that hereinbefore we were mistaken in assuming that the capital stock

of the firm of Burnham, Tulleys & Co. owned by Mr. Burnham, and transferred to his partners, included this good-will. For this our mistake, if such it was, we can offer only the apology that in no transaction preceding the exchange for stock, of this good-will, was it at all mentioned—most certainly it was not in the circular letters issued April 2, 1888. Against these subscriptions for \$200,000 of capital stock there were stock subscriptions by eastern parties for about \$110,000 at par value, for which payments were made in cash, and this last amount in fact constituted the entire assets of the Anglo-American Mortgage & Trust Company available in the business for which it was incorporated.

After the organization of the Anglo-American Mortgage & Trust Company its management was entrusted to Tulleys, Brown, and McDowell, as its officers. Indeed, in view of the amount of stock held by them, this could not have been otherwise intended. On December 7, 1888, J. V. McDowell, secretary of this mortgage and trust company, wrote to its vice president asking his advice as to making a dividend of three and one-half per cent on its capital stock. With this letter a statement of the condition of the corporation was submitted, in which there was mentioned not a single cash item, unless the term "interest, \$1,-120.39," amounted to such mention. The affairs of the corporation under the management of L. W. Tulleys, president, J. V. McDowell, secretary, E. H. Walters, treasurer, and J. N. Brown, vice president (the latter residing in New York), grew worse and worse. It is not shown how the change of the directory and the managing officers of this corporation was brought about, but it had become practically an assured fact in November, 1891. The affairs of the mortgage and trust company were then in such a condition that the stock which had actually been paid for in cash at par was scaled down fifty per cent. Messrs. Tulleys, Brown, and McDowell at the same time, and as part of the same transaction, gave up the stock which had been is-

sued to them in consideration of the good-will of the firm of Burnham, Tulleys & Co. While trouble was brewing in the fall of 1891, Mr. Burnham, upon the suggestion of one or more of the managing officers of the mortgage and trust company, withdrew the collaterals which he had received from Tulleys, Brown, and McDowell and entrusted them to Mr. Hesse, with instructions to keep them in certain safety deposit vaults named by Burnham. About January 22, 1892, Edward H. Walters, treasurer, and John V. McDowell, secretary of said mortgage and trust company, entered into a conspiracy with L. W. Tulleys, its president, in pursuance of which said Walters and McDowell filed in the circuit court of the United States for the district of Nebraska a bill in equity, the object and prayer of which was to have appointed a receiver to wind up the affairs of the Anglo-American Mortgage & Trust Company, of which the place of business then was, and since August 1, 1888, has been, in Omaha. L. W. Tulleys, as president of said company, entered its voluntary appearance, and on its behalf consented in writing to the appointment of a receiver as prayed. Upon application to the same court the affairs of the company were taken out of the hands of this receiver April 10, 1892, on account of the collusion whereby his appointment had been brought about. (*Vide Walters v. Anglo-American Mortgage & Trust Co.*, 50 Fed. Rep., 316.) Mr. Tulleys, after the appointment of the aforesaid receiver, continued to be the president of the Anglo-American Mortgage & Trust Company, until the annual meeting of the stockholders about June 1, 1892. From the commencement of the corporate existence of the mortgage and trust company the real estate securities were taken in the form of trust deeds, in each of which L. W. Tulleys was named as trustee. On account of the necessity of using some blanks on hand at the time of the incorporation of the mortgage and trust company until new blanks could be prepared, the name of Clarence

K. Hesse was retained as beneficiary in the trust deeds. After proper blanks for the purpose had been obtained, and thenceforward, the name of the Anglo-American Mortgage & Trust Co. was substituted for that of Mr. Hesse as beneficiary. It was explained by Mr. Tulleys in his deposition that this use of trustee and beneficiary was for the purpose of enabling transfers of the secured bonds simply by the blank indorsement thereof by the beneficiary, who was therefore presumably the payee named in each bond. This method of doing business had the disadvantage that it required in ordinary transactions that Mr. Tulleys should execute a release whenever a loan was paid off. In his deposition Mr. Tulleys testified that the mortgage and trust company in the fall of 1891 decided to do nothing more than wind up the business on hand. From this indefinite time thus named Mr. Tulleys is shown to have refused to execute releases as required upon payment of each loan, but to have insisted as a condition precedent, in some cases, that the commission mortgages made to Burnham, Tulleys & Co. should be paid by the holder of the bond, or, in other cases where by foreclosure Mr. Tulleys had acquired the absolute title to the land conveyed as security to him as trustee, that the deficiency judgment existing should be assigned as he directed, etc. In every instance of foreclosure the entire expense thereof was, by President Tulleys and his associate officers in the management of the Anglo-American Mortgage & Trust Company, charged to that company, although the most, if not the entire benefit thereof, accrued to the holders of the mortgages which had been made to Burnham, Tulleys & Co. Mr. Tulleys, in his deposition, avowed that he refused to execute releases or conveyances without the claims originally held by Burnham, Tulleys & Co. being provided for, "because," he said, "I considered myself trustee for the holder of the first mortgage and trustee for Burnham, Tulleys & Co." From these considerations it is quite evident that Mr. Tulleys, from the time he foresaw that his

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control of the Anglo-American Mortgage & Trust Company's affairs must soon cease, acted in the interest of the holders of the second mortgages without regard to the rights of the corporation of which he was president, and that his position of trustee enabled him to do this effectively. At the same time he was not unmindful of his own individual interests and future prospects, as is evident from the testimony of E. H. Walters. This witness testified that he was elected treasurer of the Anglo-American Mortgage & Trust Company in June, 1889, from which date he was also a director of said company; that when the receiver was appointed the commission notes, which meantime by order of Mr. Burnham had been by Mr. Hesse turned over to Tulleys, McDowell, and Walters, were taken by this witness to Council Bluffs, Iowa, where such as are unpaid still remain; that when the receiver was appointed, about January 22, 1892, Mr. Tulleys, president, left the office of the mortgage and trust company, and that seven days before this time witness had left said office. When pressed as to having taken steps looking to the organization of a business in Council Bluffs this witness very guardedly answered and repeated that there were no such steps taken prior to the date at which he severed his connection with the company. He also admitted that after his employment by the mortgage and trust company had ceased, he secured information from the mortgage and trust company's books, which was afterwards used by Mr. Tulleys and himself, under the name of "L. W. Tulleys, trustee;" that immediately after this witness left the mortgage and trust company's employment, he and Mr. Tulleys commenced corresponding with investors and got orders from them to take charge of their business. This was done at Council Bluffs, Iowa, under the name of "L. W. Tulleys, trustee." There are embodied in the bill of exceptions several letters which need not be further described, for their object has already been sufficiently indi-

cated by the testimony of the witness just referred to. As early as June 6, 1891, the bank account of the Anglo-American Mortgage & Trust Company with the Omaha National Bank was discontinued in that name, and thenceforward stood in the name of "L. W. Tulleys, trustee." There are several other matters that might be adverted to which illustrate the methods and purposes of the plaintiff in this action, but time and space forbid further reference to them. It is sufficient to say that they illustrate the same purposes attempted to be accomplished by the same means as have already been described. After Mr. Tulleys and his associate, Mr. Walters, had embarked in business in Council Bluffs, there were remittances received at the Anglo-American Mortgage & Trust Company's office in its line of business, which were payable to "L. W. Tulleys, trustee." These were indorsed by the manager of the affairs of the mortgage and trust company with the name of "L. W. Tulleys, trustee" and collected for said company. In various other ways the right of Mr. Tulleys to use the designation "L. W. Tulleys, trustee," was denied and prevented by the Anglo-American Mortgage & Trust Company in respect to its business matters. This Mr. Tulleys resented, and to prevent its continuance he commenced this action for the relief hereinbefore indicated.

It is obvious from an examination of the petition that no relief was sought in respect to such indorsements of the name of "L. W. Tulleys, trustee," as had already been made; indeed, this would be out of the question, for Mr. Tulleys does not claim that there had been misappropriated funds owned by him. The injunction sought was in effect to restrain this mortgage and trust company from transacting its own business. This officer, who has been recreant to his duties and who has sought to misappropriate that good-will of a corporation, for which in his official capacity he had formerly been an instrumentality in procuring to be paid the sum of one hundred thousand dollars,

now has the hardihood to ask a court of equity to assist him in the further betrayal of his trust. He, with apparent sincerity, claims that in the designation "L. W. Tulleys, trustee," he has a sole proprietary right, which the courts are bound to protect, irrespective of all other considerations. The word "trustee" itself excludes the idea of proprietorship therein for his own sole benefit. It indicates that he is acting in a trust capacity, which fact of necessity implies the existence of a beneficiary, and the proofs conclusively show that that beneficiary was and still continues to be the Anglo-American Mortgage & Trust Company. It is the province of a court of equity to enforce trusts of this character rather than to render them nugatory. It is insisted by appellant, however, that not even a court of equity has jurisdiction to decree in favor of one party the right to use the name of another. It is not necessary to consider what jurisdiction the district court might have possessed if the mortgage and trust company had brought original action for the same relief as was prayed in its answer. By invoking in aid of his alleged exclusive proprietary interest in the designation "L. W. Tulleys, trustee," the powers of a court of equity, the appellant waived the right to question that court's jurisdiction to administer complete equity between the parties litigant as to the subject-matter involved. (*Swift v. Dewey*, 20 Neb., 107; *Buchanan v. Griggs*, 20 Neb., 165.) In *Sherwin v. Gaghagen*, 39 Neb., 238, it was said: "The rule is that where the party, having the right to object, voluntarily submits to the jurisdiction of a court of equity, the cause will be retained for trial on its merits and the proper relief awarded." The answer of the Anglo-American Mortgage & Trust Company, in the nature of a cross-petition, in effect prayed that Lysander W. Tulleys, the plaintiff, should be enjoined from a misuse of the designation "L. W. Tulleys, trustee," to his own advantage, and that, as a member of the firm of Burnham, Tulleys & Co., he should

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be restrained from a misuse of the said trusteeship for the benefit of the firm last named to the disadvantage of the Anglo-American Mortgage & Trust Company, and that, by conveyances to be ordered by the court, such abuses as had already been perpetrated in the name of "L. W. Tulleys, trustee," should be corrected. This was in relation to the same subject-matter as was presented by Tulleys in his petition, and the decree conformably to the prayer of the answer was within the rule above laid down. It follows that the judgment of the district court is

AFFIRMED.

DEWEY & STONE ET AL. V. JOHN KAVANAUGH ET AL.

FILED MAY 22, 1895. No. 5844.

1. **Attachment: DELIVERY BOND: APPROVAL.** Sections 206 of the Code of Civil Procedure construed, and *held*, (1) that a delivery bond executed in pursuance of said section is not designed to have, nor does it have, the effect of discharging the attachment; (2) such a bond, when executed and approved, takes the place of the attached property; (3) such bond can be approved only by the officer holding the writ of attachment.
2. **Clerk of District Court: APPROVAL OF DELIVERY BOND: ACTION ON OFFICIAL BOND; LIABILITY OF SURETIES.** Where a clerk of a district court approved a delivery bond executed in pursuance of said section and thereupon directed the officer holding the writ of attachment to return the attached property to the persons in whose possession it was when he attached it, and the officer did so, and the plaintiffs in the attachment suit recovered a judgment and an order sustaining the attachment, and neither said property nor its appraised value in money was forthcoming to answer said judgment, and the plaintiffs in attachment sued the clerk and the sureties on his official bond for approving said delivery bond because in fact some of said sureties thereon had not signed the same, *held*, (1) that it was no part of the duty of the clerk of the district court to approve

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such bond, and that his doing so was not an act done by virtue of his office, and that, therefore, the sureties on his official bond were not liable for such act of the clerk; (2) that the mere facts that the clerk approved the bond and directed the sheriff to release the attached property, in the absence of evidence of fraud or deceit practiced by the clerk, were not alone sufficient to render him liable to the plaintiffs in attachment for the loss sustained by reason of the clerk's approval of the bond and the release of the property by the sheriff in obedience to the order of the clerk.

ERROR from the district court of Greeley county. Tried below before HARRISON, J.

Batty, Casto & Dungan, James R. Hanna, Wright & Wright, and G. W. Scott, for plaintiffs in error.

M. B. Gearon and T. J. Doyle, contra.

RAGAN, C.

Dewey & Stone and others brought this suit in the district court of Greeley county against John Kavanaugh, the clerk of the district court of said county, and the sureties on his official bond. A general demurrer was sustained to the petition and the action dismissed. The correctness of the ruling of the district court in sustaining this demurrer is the only question presented here.

The petition alleged, in substance, that in September, 1891, the plaintiffs in error brought certain actions in the district court of said Greeley county against a copartnership by the name of Jordan & McCarthy. These actions were brought for the recovery of money. Attachments were issued and levied upon the goods and chattels of the said Jordan & McCarthy. On the 28th of May, 1888, the sheriff of said county returned the several writs of attachment in his hands, showing that he had levied them on the goods and chattels of Jordan & McCarthy, and that he then had the said goods in his possession by virtue of their seizure under

said attachment writs; that on the 7th of June, 1888, the clerk of the district court received from Jordan & McCarthy a bond in words and figures as follows:

"Whereas, * * * the sheriff of Greeley county, Nebraska, did on the 15th day of May, 1888, on an order of attachment issued out of the district court of Greeley county, * * * attach certain goods and chattels in the hands of Jordan & McCarthy in a case pending in said district court wherein Dewey & Stone et al. * * * are plaintiffs and Jordan & McCarthy are defendants, which property is appraised at the sum of \$1,362.99, and which property is now delivered to Jordan & McCarthy at their request: Now, that Jordan & McCarthy, as principals, and Daniel Ford and P. H. McCarthy, as sureties, do hereby undertake to the plaintiffs in the sum of \$2,725.98 that said property to-wit, a certain stock of hardware and furniture now in the store of Jordan & McCarthy in Greeley Center, Nebraska, or its appraised value in money, shall be forthcoming to answer to the judgment of the court in this action.

JORDAN & MCCARTHY,

"By E. J. JORDAN.

"DANIEL FORD.

"P. H. MCCARTHY.

"MICHAEL MCCARTHY."

and that Kavanaugh, in his official capacity as clerk, on said day duly approved said bond; that said Kavanaugh on said date, after the approval by him of said bond, issued to the sheriff of said Greeley county an order in writing in words and figures as follows:

"STATE OF NEBRASKA, }
"GREELEY COUNTY. } ss.

"To the sheriff of said county: Whereas, the defendants Jordan & McCarthy have executed to the plaintiffs a bond as provided in section 206 of the Code of Civil Procedure, in double the amount of \$1,362.99 as stated in the bond, which has been approved by me, to the effect that the de-

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fendants shall perform the judgment of the court: You are therefore commanded to restore the property attached in said action, or the proceeds thereof, to the said Jordan & McCarthy, or their agents or attorneys, and make due return of this order. Signed this 7th day of June, A. D. 1888.

“JOHN KAVANAUGH,

“Clerk of the District Court.”

That the sheriff of said county, in pursuance of said order, restored the goods and chattels which he had attached to the said Jordan & McCarthy, and on the 7th of June, 1888, made due return on the writs of attachment in his hands to that effect; that such proceedings were afterwards had in the suits of the plaintiffs in error against Jordan & McCarthy that the plaintiffs in error obtained judgments against the said Jordan & McCarthy for certain sums of money and also a judgment against the said Jordan & McCarthy sustaining the attachments against their goods and chattels, and an order that said goods be sold to satisfy the said judgments; that all said judgments remained wholly unsatisfied at the time of bringing of this suit; that the said Jordan & McCarthy had failed to have the attached property forthcoming to answer the judgments of the district court pronounced in said suits, and the said Jordan & McCarthy had failed to pay into court or to the plaintiffs in error, or to any one for them, the appraised value of said attached property in money; that Jordan & McCarthy and each of them were insolvent; that execution had been issued on the judgments obtained by the plaintiffs in error against the firm of Jordan & McCarthy and been returned wholly unsatisfied; that the plaintiffs in error had instituted suit in the district court of Greeley county against Jordan & McCarthy as principals and the parties whose names were signed as sureties to the bond or obligation executed by them and approved by the clerk of the district court on the 7th of June, 1888; that said suit resulted in a finding and judgment of said court that Daniel Ford, P. H. Mc-

Carthy, and Michael McCarthy, the parties whose names were signed as sureties to the bond of Jordan & McCarthy of June 7, 1888, and approved by the clerk, never in fact executed said bond. The petition then alleged in effect that Kavanaugh, the clerk, by approving the bond and sureties of Jordan & McCarthy dated June 7, 1888, when in fact the sureties to said bond did not sign the same, had been guilty of official misconduct, had become liable to the plaintiffs in error on his official bond for the appraised value of said attached property.

The bond which the clerk approved was executed in pursuance of and under the provisions of section 206 of the Code of Civil Procedure, which provides: "The sheriff shall deliver the property attached to the person in whose possession it was found, upon the execution by such person, in the presence of the sheriff, of an undertaking to the plaintiff, with one or more sufficient sureties, resident in the county, to the effect that the parties to the same are bound in double the appraised value thereof, that the property or its appraised value in money shall be forthcoming to answer the judgment of the court in the action." It was not the duty of the clerk of the district court to approve this bond, and his act in approving this bond was not one done by virtue of his office. It was the duty of the sheriff to hold in his possession the property he had attached at the suit of the plaintiffs in error against Jordan & McCarthy, unless they had given him a bond, with sureties approved by himself, to have said property or its appraised value in money forthcoming to answer the judgment of the court; or unless Jordan & McCarthy had procured the dissolution of the attachment by the execution of a bond in pursuance of sections 219 and 220 of the Code of Civil Procedure. The execution of the bond provided for by said section 206 was not designed to have, nor did it have, the effect of discharging the attachments. The case and all its proceedings stood precisely as if such bond had not

been given. The only effect of the bond was to have it take the place of the property; and such bond could be approved, and approved only, by the officer holding the writ of attachment. (*Cortelyou v. Maben*, 40 Neb., 512.) Until such officer had approved such bond he was without authority to release said property or deliver it to Jordan & McCarthy. He may have been misled by the order made by the clerk of the district court, but that order affords no protection whatever to the sheriff. He was bound to know the law. Kavanaugh, by approving the redelivery bond of Jordan & McCarthy, in effect certified not only that the parties whose names appeared on said bond as sureties actually signed it in his, Kavanaugh's, presence, but that they were financially responsible; but it was no part of Kavanaugh's duty as clerk of the district court to approve this bond and, therefore, the act was not one done by virtue of his office, and consequently the sureties on his bond are not liable for his act or misconduct, if it was misconduct, as sureties on official bonds are answerable only for such acts of their principals as are done by virtue of their office. (*Ottenstein v. Alpaugh*, 9 Neb., 237.)

Counsel for plaintiffs in error insist that Kavanaugh at least was liable to them, and for that reason that the demurrer should have been overruled; but it is to be remembered that this is not an action against Kavanaugh for any wrong or deceit practiced by him by which the plaintiffs in error were damaged, and the petition contains no averments of fact which show or tend to show that Kavanaugh in anything that he did was actuated by other than honest motives. From anything that appears in this petition Kavanaugh thought he had authority to approve this bond and order the sheriff to release the property, and the mere facts that Kavanaugh approved the bond and directed the sheriff to release the attached property are not alone sufficient to render Kavanaugh liable to the plaintiffs in error. The petition, therefore, does not state a cause of action

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against either Kavanaugh or the sureties on his official bond. The district court was right in sustaining the demurrer, and its judgment is

AFFIRMED.

HARRISON, J., not sitting.

FRANK MIZERA, APPELLANT, v. S. W. AUTEN ET AL.,
APPELLEES.

FILED MAY 22, 1895. No. 6277.

Schools and School Districts: ERECTION OF BUILDING: APPROPRIATION OF FUNDS: AUTHORITY OF DIRECTORS. Certain sections of chapter 79, Compiled Statutes, 1893, entitled "Schools," construed, and held, (1) that the electors of a school district, and they alone, at their regular annual meeting, or at a special meeting called for such purpose, have power to direct the building of a school house; (2) that the district board of a school district has no power or authority of law to appropriate the funds of a school district to the erection of a school house, unless first authorized so to do by a vote of the electors of such school district; (3) that when a school district owns a school house site and has the money in its treasury sufficient to build a school house, which money was raised for that purpose, the electors of such school district, at any regular annual meeting, or at a special meeting called for that purpose, may direct the building of a school house on the school site, and that such school building be paid for out of the funds on hand for that purpose; (4) that the electors at such meeting may designate the school board to act as the agent of the district to superintend the construction of such school house; (5) that if no one is designated by the electors of the school district to superintend the construction of a school building directed to be built, then the school board of such district has authority to make contracts and superintend the erection of the school building ordered; (6) that the electors of a school district are not obliged to select the members of the school board as agents to superintend the construction of a building ordered to be built, but may select such person or persons as, in their judgment, will best subserve the interests of the school district.

APPEAL from the district court of Saunders county.
Heard below before WHEELER, J.

H. Gilkeson and Frick & Dolezal, for appellant, cited: *School District v. School District*, 12 Neb., 242; *People v. Peters*, 4 Neb., 254; *Ward v. School District*, 10 Neb., 296; *Zottman v. City of San Francisco*, 20 Cal., 96; *City of Leavenworth v. Rankin*, 2 Kan., 357; *Maher v. State*, 32 Neb., 355; *McCracken v. City of San Francisco*, 16 Cal., 591; *Cross v. Mayor of Morristown*, 18 N. J. Eq., 305.

Simpson & Sornborger, contra.

RAGAN, C.

Briefly, the material facts in this case are: On the 27th day of June, 1892, the electors of school district No. 14 of Saunders county, at their regular annual meeting held on that day, voted the erection of a school house on the school grounds belonging to said district, such school house not to exceed a specified sum, there then being in the treasury of said district sufficient funds to build such school house, which funds had been previously raised for that purpose. At such meeting the electors of said district by a vote appointed S. W. Auten, Moritz Ladenburger, and Jasper Swan, three electors of said district, a building committee, and instructed them to advertise for bids for building such school house, and to build a school house on the grounds belonging to the district. The gentlemen appointed as such building committee entered into a contract with one Michael Sorrick, in and by which the latter contracted to furnish the material and build a school house on the school district grounds. The contract between the building committee and Sorrick did not expressly recite that the building committee was acting for and on behalf of the school district. Sorrick also gave a bond to the building committee, naming them individually, as obligees to com-

ply with his contract in reference to furnishing the material and building the school house. Sorrick began the erection of the school house according to his contract with the building committee and had the building well under way when on the 20th of September, 1892, Frank Mizera brought this suit to the district court of Saunders county against said building committee and said contractor to enjoin the further building and completion of said school house on said school grounds. The district court on a final hearing of the case dissolved the temporary injunction which had been granted by the county judge and dismissed Mizera's petition, from which decree he has appealed.

1. The principal argument relied on here for a reversal of the decree appealed from, and the one upon which all the other arguments of appellant depend, is thus stated by his learned counsel: "That the appointment of the building committee was wholly void, because not authorized by any law, because the electors of said school district could authorize no one to build a school house except the district board of that school district." In other words, the argument is that the members of the school board of a school district are the only persons that the electors of such district at their annual meetings can authorize to act as agents of the school district to superintend the building of a school house therefor; and if the electors of a school district at their annual meeting duly appoint any other persons than the members of the school board to superintend the erection of a school house for said district, that such appointment is absolutely void; that such persons are incompetent in law to be the agents of such school district for such purpose. This question involves the construction of certain portions of chapter 79, Compiled Statutes, 1893, entitled "Schools." By section 2 of subdivision 1 of said chapter the school districts of this state are declared to be bodies corporate and to possess all the usual powers of corporations for public purposes. And in subdivision 2 of said chapter, in

section 10, it is provided: "The said qualified voters [of a school district] shall also have power, at any annual or special meeting, to direct * * * the building * * * of a school house." And by section 12 of said subdivision it is provided that the legal voters at such annual meeting may determine the amount of money that "shall be expended for the building * * * of school house in said district." And by section 13 of said subdivision it is provided that the moneys on hand collected from tax levies or from the sale of bonds for the purpose of building a school house "shall be expended under the direction of the district made at the annual meeting, or in absence of such direction then such tax [moneys] shall be expended as the district board of the district may direct." And by section 6 of subdivision 5 of said chapter it is provided: "They [the school district board] shall purchase or lease such site for a school house as shall have been designated by the district, in the corporate name thereof, and shall build, hire, or purchase such school house out of the fund provided for that purpose, and shall make sale and conveyance of any site or other property of the district, when lawfully directed by the qualified voters at any annual or special meeting." Reading and construing these several sections together we reach the following conclusions: (1) That the electors of a school district, and they only, at their regular annual meeting or at a special meeting called for such purpose, have power to direct the building of a school house; (2) that the district board of a school district has no power or authority of law to appropriate the funds of a school district to the erection of a school house, unless first authorized so to do by a vote of the electors of such school district; (3) that when a school district owns a school house site and has the money in its treasury sufficient to build a school house, which money was raised for that purpose, the electors of such school district, at any regular annual or at a special meeting called

for that purpose, may direct the building of a school house on the school site, and that such school building be paid for out of the funds on hand for that purpose; (4) that the electors at such meeting may designate the school board to act as the agent of the district to superintend the construction of such school building; (5) that if no one is designated by the electors of the school district to superintend the construction of the school building directed to be built, then the school district board of such district has authority to make contracts and superintend the erection of the school building ordered; (6) that the electors of such a school district are not obliged to select the members of the school board as agents to superintend the construction of the building ordered to be built, but may select such person or persons as in their judgment will best subserve the interests of the school district. The courts must presume that the legislature in the passing of a law takes into consideration existing facts and conditions. Under our statutes both men and women are eligible as members of our school boards. Persons abundantly qualified by reason of their training and experience as educators to manage the schools and superintend the education of the young might, of all people in the district, be the least competent to superintend the erection of a building. Whether this fact was present in the mind of the legislature and led to the adoption of the law as it now stands, by which the electors of a district are not limited to the selection of the members of the school board as agents to superintend the construction of buildings, is not material. It is sufficient to say that while the law makes the school board the agents of the district for the purpose of employing teachers, conducting the schools, and caring for and controlling the property of the school district, it does not prohibit the electors of the district from appointing from among their number a committee or agents to superintend the construction of a school building, nor compel such electors to make

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the members of the school board such agents or building committee. The decree of the district court is

AFFIRMED.

CHARLOTTE BUCKINGHAM, APPELLANT, V. JACOB ROAR,
ADMINISTRATOR, ET AL., APPELLEES.

FILED MAY 22, 1895. No. 5642.

1. **Witnesses: HUSBAND AND WIFE.** Neither husband nor wife can be examined in any case as to any communication made by the one to the other while married, nor shall they after the marriage relation ceases be permitted to reveal in testimony any such communication made while the marriage subsisted. (Code, sec. 332.)
2. ———: ———: **EVIDENCE.** A husband and wife by their joint deed conveyed certain real estate of the husband to his son. The wife then brought an action against the son and husband to cancel the conveyance, so far as it operated to release her dower interest in the real estate conveyed, on the alleged ground that she was induced to join in said conveyance by misrepresentation and fraud. *Held*, (1) That the husband was only a nominal defendant and had no interest adverse to the wife in the result of the action; (2) that notwithstanding the husband was made a defendant to the suit the wife was a competent witness in her own behalf; (3) that neither the husband nor the wife could testify as to any conversation which occurred between them with reference to the subject-matter of the suit; (4) that the testimony of the husband which tended to sustain the conveyance was incompetent, being adverse to the interest of the wife.
3. **Review: TRIAL TO COURT: ADMISSION OF INCOMPETENT TESTIMONY.** Where incompetent testimony is given on the trial of an equity case this court, in reviewing such case on appeal, will presume that such testimony was not considered by the district court.
4. **Witness: HUSBAND AND WIFE.** *Niland v. Kalish*, 37 Neb., 47, *Skinner v. Skinner*, 38 Neb., 756, and *Greene v. Greene*, 42 Neb., 634, distinguished.

APPEAL from the district court of Saline county. Heard below before HASTINGS, J.

F. I. Foss and *J. D. Pope*, for appellant, cited: *Hager v. Reed*, 11 O. St., 626; *American Savings Bank v. Harrington*, 34 Neb., 597.

Palmer & Hendee, contra, cited: *Stewart v. Lispenard*, 26 Wend. [N. Y.], 255; *Blanchard v. Nestle*, 3 Den. [N. Y.], 37; *Staples v. Wellington*, 58 Me., 453; *Wamsley v. Crook*, 3 Neb., 350; *Ransom v. Schmela*, 13 Neb., 77; *Magenau v. Bell*, 13 Neb., 248; *Housel v. Cremer*, 13 Neb., 300; *Kimball v. Kimball*, 16 Mich., 211; *Grand Gulf Railroad & Banking Co. v. Bryan*, 8 S. & M. [Miss.], 275; *Kelton v. Hill*, 59 Me., 259; *Hollister v. Young*, 41 Vt., 160.

Robert Ryan, also for appellees.

RAGAN, C.

On the 7th day of February, 1891, John Buckingham was the owner of a farm of 240 acres, situate in Saline county, Nebraska, and also the owner of a house and lot in the village of Friend, in said county, on which lot he at that time resided with his family. On said date Buckingham conveyed to his wife the house and lot in the village of Friend, and he and his wife united in a deed of conveyance of the farm to one David T. Buckingham, a son of John Buckingham. Subsequently, David T. Buckingham conveyed eighty acres of the land to his brother Perry E. Buckingham, and another eighty acres to his brother Ira Buckingham. In October, 1891, Charlotte Buckingham, the wife of John Buckingham, brought this suit in the district court of Saline county, making her husband, John Buckingham, and his sons, David T. Buckingham Perry E. Buckingham, and Ira Buckingham, and their wives, defendants. The object of Mrs. Buckingham's action was

to have the conveyance of the 7th of February, 1891, made by herself and husband to David T. Buckingham, set aside in so far as she was concerned. Mrs. Buckingham asked to have this conveyance annulled because she alleged that she was procured to join in the execution of said deed by misrepresentation and fraud. In substance, her statement of the facts in reference to this misrepresentation and fraud is as follows: On the 6th of February, 1891, she and her husband had some trouble; her husband threw her outdoors, she fell on the ice and broke her arm; on the 7th of February, 1891, her husband deeded her the said house and lot in the village of Friend, gave her some notes, amounting to about \$400, all in satisfaction and discharge of the injuries she had sustained by reason of the assault made on her by her husband on the 6th of February; that at that time there was a windmill and some other chattels on the lot in Friend which the husband was to have and remove, and he represented to Mrs. Buckingham that in order to obviate all future questions as to the ownership of these chattels she should sign a writing setting out that he was the owner of the chattels and had the right to remove them; and that at the time she signed the deed sought to be set aside she supposed she was signing the writing giving her husband the title and possession to the chattels on said lot. After the action was brought and personal service had upon John Buckingham it appears that he went to Freeport, Illinois, to be treated for cancer, and while there his deposition was taken and filed in this case. Before the case was tried John Buckingham died and one Jacob Roar, his administrator, was, by order of the court and the consent of all parties, made a defendant to the action. The district court found the issues in favor of the defendants and dismissed Mrs. Buckingham's petition, and she has appealed.

It will be seen from the foregoing statement that the only issue of fact involved in this case was and is whether

Mrs. Buckingham, at the time she executed the deed of February 7, 1891, with her husband to David T. Buckingham, knew that she was signing a deed for the 240 acres of land. On the trial Mrs. Buckingham was sworn and testified in her own behalf, and the deposition of John Buckingham was offered in evidence, but the record does not disclose whether the deposition was read. The argument of the appellant here is that we should consider all the evidence of Mrs. Buckingham in connection with the other evidence in the case, and if this be done that the decree of the district court must be reversed. We cannot stop to quote the evidence in this case, nor any considerable portion of it, and it must suffice to say that if the entire deposition of John Buckingham be excluded from consideration, and the entire evidence of Mrs. Buckingham be considered together with the other evidence in the case, the decree of the district court is still supported by sufficient competent evidence. Mrs. Buckingham was a competent witness for herself in this case. Her action was in effect one brought against the sons of John Buckingham to set aside, so far as she was concerned, the conveyance of herself and husband of the 7th of February. It is true her husband was a nominal defendant to this action, but he had no interest whatever in the result of it. The action did not seek to set aside the conveyance so far as John Buckingham was concerned, nor did he by his answer ask to have that conveyance set aside. We repeat that the only object of the action was to have set aside the release of the dower rights of Mrs. Buckingham in the land resulting from her execution of the conveyance. This statement does not conflict with section 331 of the Code of Civil Procedure, which declares, with certain exceptions, that the husband can in no case be a witness against the wife, nor the wife against the husband, nor with the construction placed on said section in *Niland v. Kalish*, 37 Neb., 47, *Skinner v. Skinner*, 38 Neb., 756, and *Greene v. Greene*, 42 Neb., 634.

On the trial Mrs. Buckingham testified to the communications, conversations, and agreements had between herself and husband on the 7th of February, 1891, just prior to the execution of the deed which she seeks to annul by this action. All this testimony was incompetent. Section 332 of the Code of Civil Procedure provides: "Neither the husband nor wife can be examined in any case as to any communication made by the one to the other while married, nor shall they, after the marriage relation ceases, be permitted to reveal in testimony any such communication made while the marriage subsisted." While therefore we think that section 331 of the Code did not render Mrs. Buckingham an incompetent witness in this case, we are quite clear that all the evidence given by her as to what transpired between herself and husband on the 6th of February and on the 7th of February, just prior to the execution of the deed by them to David Buckingham, was incompetent and should not be considered by us; and we have no doubt that this is the view taken by the district judge, and that he did not consider such testimony in making up his finding. It is argued here by counsel for the appellees that the testimony of Mrs. Buckingham as to the conversations, communications, and transactions between herself and husband immediately preceding and which led up to the conveyance sought to be impeached by this action were incompetent by reason of section 329 of the Code, which provides: "No person having a direct legal interest in the result of any civil action or proceeding, when the adverse party is the representative of a deceased person, shall be permitted to testify to any transaction or conversation had between the deceased person and the witness," etc. But the provisions of this section alone would not preclude Mrs. Buckingham from testifying to the transactions and conversations had between herself and husband, for the reason that the adverse party to Mrs. Buckingham's suit was not her husband's administrator; but his sons.

Travelers Ins. Co. v. Snowden.

The husband, John Buckingham, had he been living at the time of the trial, could not have testified as to the facts set out in his deposition, as these facts militated against the claims of the wife in this suit; and for that reason the deposition cannot be considered by us, and we presume was not considered by the district court. The decree of the district court is

AFFIRMED.

RYAN, C., not sitting.

TRAVELERS INSURANCE COMPANY V. ANDREW J.
SNOWDEN.

FILED MAY 22, 1895. No. 5696.

Insurance: ACCIDENT POLICY: VALIDITY OF EXCEPTION CLAUSE:

INSTRUCTIONS. An insurance company issued a policy describing the occupation of the insured as "cattle dealer, or broker and shipper, not tender or drover, not on ranch or farm." Among the provisions of the policy was one to the effect that the insurance did not cover injuries resulting "from any of the following causes, or while so engaged or affected: * * * Violating law; violating rules of a corporation; * * * voluntary exposure to unnecessary danger; entering or trying to enter or leave a moving conveyance using steam as a motive power; riding in or on any such conveyance not provided for the transportation of passengers; walking or being on a railway bridge or road-bed. (Railway employes excepted.)" The answer set up that the injuries were within the exceptions of the policy. The court refused to instruct the jury that the plaintiff could not recover for injuries so sustained, while entering or trying to enter a moving conveyance using steam as a motive power, or if he received the injury while riding in or upon such conveyance not provided for the transportation of passengers. There was evidence tending to show that the injuries were sustained under such circumstances. *Held*, (1) That it was competent for the parties to contract that the insurance should not extend to injuries so received; (2) that it was error to refuse the instructions

referred to; (3) that on this branch of the case there was no issue of negligence involved, the question being whether the injuries were within the contract of the parties, not whether the plaintiff was conducting himself in a prudent manner when they were sustained.

ERROR from the district court of Buffalo county. Tried below before HAMER, J.

The facts are stated by the commissioner.

Charles Offutt and *Charles S. Lobingier*, for plaintiff in error :

The exception clauses relied upon are not only valid but commendable. They are enforceable under the general principle of the law of contracts. (2 Parsons, Contracts, 494*, 500*, 505*; *Robertson v. French*, 4 East [Eng], 135; *Universal Life Ins. Co. v. Devore*, 83 Va., 267; *Schuylkill Navigation Co. v. Moore*, 2 Whart. [Pa.], 491; May, Insurance [2d ed.], sec. 172; *Shader v. Railway Passenger Assurance Co.*, 66 N. Y., 441; *Standard Life & Accident Ins. Co. v. Jones*, 10 So. Rep. [Ala.], 530.)

Particularly the courts have enforced the clauses which except death from the "violation of law" (*Duran v. Standard Life & Accident Ins. Co.*, 22 Atl. Rep. [Vt.], 530; *New York Accident Ins. Co. v. Clayton*, 59 Fed. Rep., 559—both violations of Sunday law—*Travelers Ins. Co. of Hartford v. Seaver*, 19 Wall. [U. S.], 531), "voluntary exposure to unnecessary danger" (*Travelers Ins. Co. v. Jones*, 17 Ins. L. J. [Ga.], 784; *Hull v. Equitable Accident Association*, 42 N. W. Rep. [Minn.], 936; *Tuttle v. Travelers Ins. Co.*, 134 Mass., 175; *Sautelle v. Railway Passenger Assurance Co.*, 18 Ins. L. J. [N. Y.], 892; *Morel v. Mississippi Valley Life Ins. Co.*, 4 Bush [Ky.], 535; *Hill v. Travelers Ins. Co.*, 17 Can. L. J., 44; *Wright v. Sun Mutual Life Ins. Co.*, 29 U. C. C. P., 221), "entering or trying to enter a moving conveyance" (*Miller v. Travel-*

ers Ins. Co., 39 Minn., 548), and "violating the rules of a corporation" (*Bon v. Railway Passenger Assurance Co.*, 56 Ia., 664).

The court erred in its instructions in substituting the tests of negligence for the terms of the contract which excepted voluntary exposure. (*Hull v. Equitable Accident Association*, 42 N. W. Rep. [Minn.], 936; *Miller v. Travelers Ins. Co.*, 39 Minn., 548; *Damont v. New Orleans & C. R. Co.*, 9 La. Ann., 441.)

H. M. Sinclair, contra, cited: *Marx v. Travelers Ins. Co.*, 39 Fed. Rep., 321; *Burkhard v. Travelers Ins. Co.*, 102 Pa. St., 262; *Freeman v. Travelers Ins. Co.*, 144 Mass., 572; *Tucker v. Mutual Benefit Life Ins. Co.*, 50 Hun [N. Y.], 50; *Scheiderer v. Travelers Ins. Co.*, 58 Wis., 13; *Cotton v. Fidelity & Casualty Co.*, 41 Fed. Rep., 506; *Tooley v. Railway Passenger Assurance Co.*, 2 Ins. L. J. [Ill.], 275; *Bizzell v. Booker*, 16 Ark., 308; *Baltimore & P. R. Co. v. Jones*, 95 U. S., 439; *Wabash, St. L. & P. R. Co. v. Locke*, 112 Ind., 404; *Philadelphia, W. & B. R. Co. v. Stinger*, 78 Pa. St., 225; *Milwaukee & St. P. R. Co. v. Arms*, 91 U. S., 494; *Karr v. Parks*, 40 Cal., 188; *Moore v. Central Railroad of Iowa*, 47 Ia., 688; *Frandsen v. Chicago, R. I. & P. R. Co.*, 36 Ia., 372; *Lowery v. Manhattan R. Co.*, 99 N. Y., 158; *Matson v. Maupin*, 75 Ala., 312; *Richmond & D. R. Co. v. Howard*, 79 Ga., 44; *Chicago & E. I. R. Co. v. Hedges*, 105 Ind., 398; *Briggs v. Union Street R. Co.*, 148 Mass., 72; *Brown v. Congress & B. S. R. Co.*, 49 Mich., 153; *Kay v. Pennsylvania R. Co.*, 65 Pa. St., 269; *Durant v. Palmer*, 29 N. J. Law, 546; *Gravell v. Minneapolis & St. L. R. Co.*, 11 Fed. Rep., 569; *Hoag v. Lake Shore & M. S. R. Co.*, 85 Pa. St., 293; *Milwaukee & St. P. R. Co. v. Kellogg*, 94 U. S., 469; *Doggett v. Richmond & D. R. Co.*, 78 N. Car., 305; *Allen v. St. Louis Ins. Co.*, 85 N. Y., 473; *Wilson v. Conway Fire Ins. Co.*, 4 R. I., 156; *Bartlett v. Union Mutual Fire*

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Ins. Co., 46 Me., 500; *Bowman v. Pacific Ins. Co.*, 27 Mo., 152; *Phoenix Ins. Co. v. Slaughter*, 12 Wall. [U. S.], 404; *North American Life & Accident Ins. Co. v. Burroughs*, 69 Pa. St., 43; *National Benefit Association v. Jackson*, 114 Ill., 533; *Griffin v. Western Mutual Benevolent Association*, 20 Neb., 620; *Phoenix Ins. Co. v. Barnd*, 16 Neb., 90; *Bloom v. Franklin Life Ins. Co.*, 97 Ind., 478; *Cluff v. Mutual Benefit Ins. Co.*, 13 Allen [Mass.], 308, 99 Mass., 317; *Bradley v. Mutual Benefit Life Ins. Co.*, 45 N. Y., 422; *Murray v. New York Life Ins. Co.*, 96 N. Y., 614; *Travelers Ins. Co. v. Seaver*, 19 Wall. [U. S.], 531; *Kerr v. Minnesota Mutual Benefit Association*, 39 Minn., 174; *Harper v. Phoenix Ins. Co.*, 18 Mo., 109, 19 Mo., 506.

IRVINE, C.

This was a suit on a policy of accident insurance, and resulted in a judgment in favor of the plaintiff, from which the defendant insurance company prosecutes error.

The policy sued upon insured Snowden against loss of time, not exceeding twenty-six consecutive weeks, resulting from bodily injuries, effected through external, violent, and accidental means, with a provision that if the loss of one entire hand or foot should result from such injuries alone within ninety days, the insurer would pay one-third of the principal sum, such sum being \$5,000. The policy designated Snowden's classification as "preferred (being a cattle dealer or broker and shipper, not tender or drover, not on ranch or farm, by occupation)." The insuring clause of the policy began, "does hereby insure, subject to conditions on back hereof." On the back of the policy, under the heading "Agreements and conditions under which this policy is issued and accepted," was the following:

"4. This insurance does not cover * * * accident, nor death, nor loss of limb or of sight, nor disability resulting wholly or partly, directly or indirectly, from any

of the following causes, or while so engaged or affected:
* * * Violating law; violating rules of a corporation;
* * * voluntary exposure to unnecessary danger; entering or trying to enter or leave a moving conveyance using steam as a motive power; riding in or on any such conveyance not provided for the transportation of passengers; walking or being on a railway bridge or road-bed. (Railway employes excepted.)"

The answer of the insurance company alleged that the accident had been incurred under circumstances within the exceptions which we have quoted. The reply was a general denial.

The evidence tended to show that the insured was on his way from Cushing to Omaha, accompanying twelve carloads of cattle belonging to him, which he was bringing to market. The train was a long one and the cars containing his cattle were near the front end of the train. A stop was made for the purpose of taking water, at Seward, late on Sunday night. Snowden took advantage of this stop to alight from the caboose and go forward to examine his stock. He carried with him what is designated a "prod-pole," about five feet long and an inch and a half in diameter. He found a steer off its feet in a car about the fourth or fifth from the front of the train, and was endeavoring to get the steer on its feet by means of the prod-pole when the engine gave the signal to start. Snowden climbed upon the car. The train moved forward a very short distance and stopped again. Snowden dismounted and renewed his effort to get the steer on its feet. While so engaged another signal to start was given. Here the testimony becomes conflicting. Snowden testifies that he at once proceeded to climb upon the car by means of the ladder or steps on the side thereof, and that when he had almost reached the top of the car, the sudden movement of the train in starting wrenched him from the ladder and threw him upon the track, the wheels passing over one hand in

such a way as to necessitate immediate amputation. Several witnesses, both train hands and passengers, testify that immediately after the accident Snowden stated that the train had started and was gaining such headway that he feared that he would not be able to jump upon the caboose as it passed, and that he therefore endeavored to jump upon one of the stock cars as it passed him, and was thrown upon the track while making the attempt. On this state of the evidence the court gave the following instructions, and no others:

"1. Before the plaintiff can recover he must establish his case by a preponderance of evidence.

"2. If the plaintiff recover, he can only recover one third of five thousand dollars, and interest thereon at seven per cent from the time he notified the company of his injury, if he did so notify them.

"3. The plaintiff as a shipper had a right to attend the cattle which were being shipped, and if he was injured while engaged in so caring for the cattle, his loss is within the risk taken by the insurance company; provided he acted with the prudence of a man of ordinary intelligence and prudence, placed in like circumstances."

The defendant requested and the court refused to give, among others, an instruction to the effect that if Snowden received the injury while he was voluntarily exposing himself to unnecessary danger, he could not recover; another to the effect that if he received the injury while he was entering or getting upon, or trying to enter or get upon, a moving conveyance, using steam as a motive power, he could not recover; and still another, to the effect that if he received the injury while riding in or upon a moving conveyance using steam as a motive power, and which was not provided for the transportation of passengers, he could not recover. We entertain no doubt that it was entirely competent for the parties to contract for insurance not extending to the excepted risks. The company might have

insured Snowden against all manner of injuries. It might, if the parties had so desired, have insured him against a single kind of injury; for instance, if the contract provided that the company insured him only against injuries resulting from strokes of lightning, it could not possibly be claimed that the company would be liable for the injury here proved. Between these limits the parties might contract as they saw fit, and having contracted without ambiguity that the company should not be liable for injuries sustained while the insured was entering or trying to enter a moving conveyance using steam as a motive power, or while riding in or on such conveyance not provided for the transportation of passengers, we do not see that there is room for construction or for doubt as to the validity of the contract. In *Miller v. Travelers Ins. Co.*, 39 Minn., 548, a similar contract was considered, and it was held that a banker having been killed while attempting to get on a moving train, the company was not liable. The fact that the policy described Snowden's occupation as that of a cattle dealer or broker and shipper, does not conflict with the stipulation referred to. The policy also stated that he was not a tender or drover. Had he been insured as a tender or drover with a condition that the company would not be liable for injury sustained while tending or driving cattle, there would be room for doubt; had he been described as a cattle shipper, and had the policy provided that the company would not be liable if he engaged in shipping cattle, the right of the insured would be quite plain; but a man not being a tender or drover may be a cattle dealer, shipper or broker, without riding on conveyances not provided for the transportation of passengers, and without getting upon moving trains. The very fact that the business of the insured might induce him at times to do such acts, would afford a good reason for the company in its contract to expressly except from the insurance granted injuries received under such circumstances.

As we have said, there was a conflict in the evidence as to whether the train was in motion when Snowden attempted to board it, and all the evidence was to the effect that the car which he boarded was not one provided for the transportation of passengers. The court should have given the instructions requested by the insurance company on these points; and the refusal to do so was not cured by the third instruction given of its own motion. On this phase of the case no question of negligence was involved. The question was not whether Snowden, as a prudent man, was justified under the circumstances in attempting to board the car. No matter how careful he may have been, if the injury was any one against which the company had not insured him, it was not liable. The instruction relating to voluntary exposure to unnecessary danger might also have been given with propriety, although we do not hold that it was prejudiciously erroneous to refuse it, in view of the third instruction. What amounts to a voluntary exposure to unnecessary danger is necessarily largely a question of fact for the determination of the jury under all the circumstances of the case. The issue made by this provision was of a nature akin to issues on questions of negligence.

There are several assignments of error which we have not noticed, and which, in the present condition of the record, we do not deem it necessary to consider. For the errors already referred to the judgment must be reversed.

REVERSED AND REMANDED.

FIRST NATIONAL BANK OF OMAHA V. JOSEPH A.
CHILSON.

FILED MAY 22, 1895. No. 6156.

1. **Review: ISSUES BELOW: DEFECTIVE RECORD.** The action of the district court in refusing to strike out the pleadings in a cause appealed from a justice of the peace, because presenting issues not made before the justice, cannot be reviewed unless the record discloses what issues were presented before the justice.
2. **Pleading: PLEDGES: EVIDENCE.** Suit was brought upon a note by the pledgee thereof. The defendant pleaded that the debt for which the note was pledged had been paid. *Held*, That, under this answer, evidence that the pledgee had taken other security and agreed to release the note was inadmissible.
3. **Negotiable Instruments: PAYMENT: PRINCIPAL AND AGENT.** Payment of money on a note at a bank where it is made payable, when the note has not been left there and is not produced, is not a payment of the note. In such case the person receiving the money becomes the agent of the payor, not of the payee.
4. ———: ———. Evidence examined, and *held* insufficient to sustain the verdict.

ERROR from the district court of Sherman county. Tried below before HOLCOMB, J.

Nightingale Bros., for plaintiff in error.

Aaron Wall, *contra*.

IRVINE, C.

The First National Bank of Omaha sued Chilson before a justice of the peace in Sherman county, on a promissory note for \$100, dated April 27, 1888, due ninety days after date, payable to Lalk & Kriechbaum, which it was alleged had been indorsed by Lalk & Kriechbaum to the plaintiff. The defendant appealed to the district court, where judg-

ment was rendered on a verdict in his favor. The plaintiff by these proceedings seeks a reversal of the latter judgment.

The petition counts on the note and its indorsement to plaintiff. The amended answer, after a general denial, admits the execution of the note, and specially denies the transfer to plaintiff, averring that if the plaintiff ever held the note, it was held as collateral security to a debt of Lalk & Kriechbaum to the plaintiff, and that such debt has been paid. The answer further avers that the defendant paid the note to Lalk & Kriechbaum. A motion was made to strike the answer from the files for several reasons, in substance reducible to the single ground that the defense raised by the answer was not presented before the justice of the peace. This motion was overruled, and the order overruling it is one of the errors assigned. We cannot say that the district court erred in overruling this motion. The record does not disclose upon what issues the case was tried before the justice of the peace. No answer is required in an action before a justice of the peace. In the absence of an answer any defense may there be urged, whether or not it could be admitted in the district court upon a general denial. Therefore, without considering whether or not the ruling of the district court was correct on other grounds, this assignment of error must be overruled, because the record does not disclose that the amended answer presents a defense not urged before the justice. The reply to the amended answer admitted that the note was indorsed to plaintiff as collateral security, and denied that it had been paid; that Lalk & Kriechbaum were authorized to receive payment, and that the indebtedness from Lalk & Kriechbaum, for which the note had been pledged, had been paid.

The only assignment of error which we shall notice, except the one already disposed of, is that the verdict is not sustained by the evidence. The evidence shows that Lalk & Kriechbaum, who were bankers at Loup City, pledged

this note with others to the plaintiff to secure a loan of money, and that some time after this note had become due, the defendant paid its amount to Lalk & Kriechbaum. The evidence tends to show that when Lalk & Kriechbaum received the money they informed the defendant that the note was not in their possession, but that they would obtain it and deliver it to him. This is the defendants' own testimony. The evidence also tends to show that after this transaction a remittance was made by Lalk & Kriechbaum to the plaintiff of about \$500 on their indebtedness. But the evidence is undisputed that a very large indebtedness from Lalk & Kriechbaum to plaintiff remains unpaid. There is evidence tending to show that the plaintiff took from Lalk & Kriechbaum a real estate mortgage to secure this indebtedness, under an agreement that all the collateral notes should be surrendered. Under the averment in the amended answer that the principal indebtedness had been paid to the plaintiff, evidence that other security had been taken and the pledge of this note released was not admissible. Therefore, the verdict cannot be sustained upon the ground that there was evidence tending to show such a state of facts. As already stated, there was no evidence at all tending to show that the principal indebtedness had been paid. The evidence was all the other way. The note was payable by its terms at the banking house of Lalk & Kriechbaum; but the payment of money at the place designated in a negotiable instrument, where such instrument has not been left there for collection, or is not there produced, does not constitute a payment. The person receiving the money under such circumstances becomes the agent of the payor, and not of the payee. We think this principle absolutely settled. One paying money to another, to be applied on a note, which such person has not in his possession, assumes the burden to show the authority of the person to whom payment is made to receive the money. (*South Branch Lumber*

Gaines v. Bonnell.

Co. v. Littlejohn, 31 Neb., 606.) We agree with the plaintiff in error that we can conceive of no theory on which the verdict could have been found, except one of those already mentioned. The first of these presented a defense not raised by the pleadings; the second, a plea of payment of the principal indebtedness, wholly unsupported by the evidence; and the third, a plea of payment of the note sued on, which the evidence, without contradiction, shows was made to an unauthorized person.

REVERSED AND REMANDED.

CHAUNCEY F. GAINES, APPELLEE, v. F. P. BONNELL
ET AL., APPELLANTS.

FILED JUNE 18, 1895. No. 6245.

Review: FAILURE TO FILE BRIEFS. Affirmance of judgment in
absence of brief and oral argument.

APPEAL from the district court of Nuckolls county.
Heard below before HASTINGS, J.

F. P. Olmstead, for appellants.

Letton & Hinshaw, contra.

PER CURIAM.

This is an appeal from an order confirming a sale of real estate under foreclosure. The case was not argued and no briefs have been filed. The judgment is, therefore,

AFFIRMED.

CHARLES BASYE V. STATE OF NEBRASKA.

FILED JUNE 18, 1895. NO. 7277.

1. **Criminal Law: JURORS: VOIR DIRE EXAMINATION: REVIEW.**

Upon the *voir dire* examination of a venire-man the trial court should exercise a sound discretion, not only in respect to the pertinency of the questions propounded, but as to the limits, extent, and scope of the examination. In order to constitute prejudicial error a clear abuse of discretion must be shown.

2. ———: ———: ———. On the examination of a juror on his *voir dire* each party has the right, within reasonable limits, to put pertinent questions for the purpose of ascertaining whether or not there exist sufficient grounds for a challenge for cause, and also to enable the party to properly exercise his statutory right of peremptory challenge.3. ———: ———: ———: REVIEW. During the impaneling of the jury in a prosecution for murder, counsel for the accused propounded to several jurors, who had read newspaper accounts of the killing, this question: "Have you formed any opinion or conclusion in your own mind as to whether or not the defendant was guilty, or whether or not the crime of murder had been committed?" The county attorney objected as not a proper *voir dire* question, which objection was sustained by the trial court. *Held*, Error.

4. ———: WITNESSES. Under the statutes of this state the defendant is a competent witness in his own behalf. His interest in the result of the trial may be shown for the purpose of affecting his credibility.

5. ———: EXAMINATION OF JURORS. In impaneling a jury in a criminal case it is proper to ask a juror whether the fact that the defendant is charged with a crime would have any weight with the juror, and whether he could give the same credit to the testimony of the accused, should he testify in his own behalf, that he could give to the testimony of any other witness, under the same circumstances.

6. **Qualification of Jurors.** The fact of qualifications of a juror, when challenged for cause, is to be determined by the trial court from a consideration of his entire examination and such other evidence and circumstances as tend to throw light upon the subject. The appearance and general demeanor of

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the juror while being examined may be taken into consideration in determining his competency to serve.

7. ———: **CHALLENGES: DECISIONS: REVIEW.** The finding of the trial court, in deciding a challenge for cause, will not be set aside by the appellate court, unless it is clearly wrong.
8. ———: **OPINIONS.** Where, upon examination of a juror, it is shown that he has formed a hypothetical opinion, founded solely upon rumor and reading of newspaper reports, and that such opinion will not interfere with his rendering a fair and impartial verdict upon the evidence under the instructions of the court, he is not disqualified to sit in the case.
9. ———: ———. An opinion formed by a juror does not affect his competency, or afford cause for challenge, unless it is unqualified as to the guilt or innocence of the accused of the offense charged.
10. **Information: INDORSEMENT OF NAMES OF WITNESSES.** The indorsement of the surname and the initials of the Christian or given name of a witness upon an information is a sufficient compliance with the requirements of the statute which requires the names of the state's witnesses to be indorsed upon the information prior to the trial.
11. **Murder: EVIDENCE.** In a prosecution for murder it is competent for the state to prove the description and location of the wounds inflicted by the defendant upon the deceased, as tending to establish whether or not death resulted therefrom.
12. ———: ———. Dying declarations, in order to be admissible, must have been made under a sense of impending death, and it is competent for the party offering them to prove the physical condition of the deceased at the time they were made.
13. **Criminal Law: ORDER OF ADMITTING EVIDENCE.** The order in which a party shall introduce his proof is, to a great extent, discretionary with the trial judge, and the action of the court in that regard will not be cause for reversal when no abuse of discretion is shown.
14. ———: **CONFESSIONS.** A voluntary confession or admission of guilt made by a prisoner out of court is admissible in evidence against him.
15. ———: ———. *Held*, That sufficient foundation was laid for the admission of that class of testimony in this case.
16. **Attorney and Client: PRIVILEGED COMMUNICATIONS.** A communication from a party to an attorney is not privileged

where the relation of attorney and client did not exist between them.

17. ——— : ——— : DISCLOSURE IN EVIDENCE BY THIRD PERSONS.

While confidential communications between attorney and client are privileged, and neither will the attorney be permitted, nor can the client be compelled, to repeat them, yet where a client makes statements to his counsel in the presence and hearing of a third party who stands in no relation of confidence to either the attorney or client, such person may testify to such statements.

18. **Murder: REPUTATION OF DEFENDANT: EVIDENCE.** On a trial for murder, evidence tending to show the defendant's general reputation as a peaceable and quiet man in the community in which he resided prior to the offense charged is competent, but his reputation for honesty and integrity is not admissible.

19. **Criminal Law: CHARACTER OF DEFENDANT: EVIDENCE.**

Where, in a criminal prosecution, the defendant introduces evidence of his good character or general reputation, it is not competent for the state in rebuttal to put in evidence particular facts or rumors tending to prove it to be bad.

20. ——— : ——— : ———. It is permissible on cross-examination of a witness testifying in reference to character or reputation, to ascertain the extent of his information, the foundation for his opinion or the data from which he draws his conclusion; and upon such examination he may be asked, with a view to lessen the effect of his testimony as to general reputation, but not for the purpose of establishing the fact to be proved, whether he has not heard certain enumerated reports which tend to contradict the purport and effect of his testimony given on direct examination.

21. **Murder: SELF-DEFENSE: DISPOSITION OF ACCUSED: EVIDENCE.** In a prosecution for murder, where the circumstances tend to establish self-defense, evidence of the quarrelsome and irritable disposition of the deceased, and of threats recently made by him against the accused, which were communicated to the defendant prior to the killing, is admissible.

ERROR to the district court for Saunders county. Tried below before WHEELER, J.

The opinion contains a statement of the case.

Good & Good and *J. K. Vandemark*, for plaintiff in error :

The greatest latitude should be permitted in examining jurors to ascertain whether they are biased or prejudiced. The accused should not only be permitted to ask the jurors the direct question as to whether or not they have such bias or prejudice, but should be permitted to ask them any question from which the inference of bias or prejudice may be drawn. (*Monaghan v. Agricultural Fire Ins. Co.*, 18 N. W. Rep. [Mich.], 796; *Chicago & A. R. Co. v. Buttolf*, 66 Ill., 347; 1 Thompson, Trials, sec. 102.)

Error resulted from overruling challenges for cause where the examination showed that jurors had formed opinions as to the guilt of defendant. (*Miller v. State*, 29 Neb., 437; *Curry v. State*, 4 Neb., 550; *Cowan v. State*, 22 Neb., 519; *Olive v. State*, 11 Neb., 20.)

The court erred in sustaining objections to questions propounded to jurors in reference to the consideration to be given the testimony of defendant in case he should testify in his own behalf. (*Heldt v. State*, 20 Neb., 492; *Lester v. State*, 2 Tex. App., 432; *State v. McAfee*, 64 N. Car., 339; 1 Thompson, Trials, sec. 103; *People v. Car Soy*, 57 Cal., 102; *Stoots v. State*, 9 N. E. Rep. [Ind.], 380.)

Full names of the witnesses for the state should be indorsed on the information. (*Enewold v. Olsen*, 39 Neb., 59.)

The communication between defendant and his attorney, related by the witness Allen, was privileged and should have been excluded. (Wharton, Criminal Evidence, sec. 496; *Bowers v. State*, 29 O. St., 542.)

The objection to admission of defendant's confession on the ground that there was no foundation laid should have been sustained. (Greenleaf, Evidence [15th ed.], sec. 219; *Dodge v. People*, 4 Neb., 230.)

Evidence of defendant's honesty and integrity was erroneously rejected. (Wharton, Criminal Evidence [8th ed.], sec. 66.)

Defendant should have been permitted to show that deceased was a quarrelsome and irritable man. (Wharton, Criminal Evidence [8th ed.], sec. 72; 2 Thompson, Trials, sec. 2174.)

Defendant offered to prove threats made against him by deceased and the proof was erroneously excluded. (Wharton, Criminal Evidence [8th ed.], sec. 69; *State v. Tarter*, 37 Pac. Rep., [Ore.], 53; *Wiggins v. People*, 93 U. S., 467.)

Where the character of the accused is drawn in question, it is not permissible to show particular facts or acts committed by the accused in collateral matters. (*Olive v. State*, 11 Neb., 1; *Commonwealth v. O'Brien*, 119 Mass., 342; *Patterson v. State*, 41 Neb., 538.)

A. S. Churchill, Attorney General, for the state.

NORVAL, C. J.

At the January, A. D. 1894, term of the district court of Saunders county the plaintiff in error was tried upon an information charging him with murder in the first degree, by having on the 14th day of December, 1893, unlawfully, purposely, and feloniously, and of his deliberate and premeditated malice, killed and murdered one William O. Wright. The prisoner was found guilty of murder in the second degree, and thereupon he moved to set aside the verdict, and for a new trial, which motion was overruled, and he was adjudged to be imprisoned in the state penitentiary at hard labor for the term of twenty years, from which judgment and sentence he prosecutes a petition in error to this court.

The evidence contained in the bill of exceptions is quite voluminous, and it is not deemed necessary that we set out or discuss all the details thereof. For a proper understanding of some of the questions presented for review a brief statement of the facts disclosed by the record may not be out of place. From the evidence on the trial it appears that

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the plaintiff in error and the deceased resided in the town of Valparaiso, in this state, and at the time of the unfortunate tragedy they lived upon the same block. Basye was a single man, engaged in repairing and painting buggies, and roomed over his shop. On the morning of the 14th of December, 1893, the deceased went to the room of Basye, one D. O. White being present when he entered, but who remained only a short time, but after completing his settlement with Basye he left, leaving deceased and plaintiff in error alone. A few minutes after White left, Basye shot Wright with a shot-gun. The latter died from the effects of the wounds the second night thereafter. Immediately after the shooting, plaintiff in error went upon the street and told the first person he met what he had done. He then went to the law office of C. S. Allen, and soon thereafter was taken into custody. The killing is admitted. The theory of the prosecution is that it was premeditated by the plaintiff in error. The latter denies this, claiming that he fired the fatal shot in self-defense. The record discloses that two days prior to the shooting, Wright caused Basye to be arrested for keeping a house of prostitution, but before a hearing was had the case was compromised and the complaint withdrawn, the defendant paying the costs. The state produced as a witness one Dan F. Riley, who testified that on the evening after the dismissal of the criminal case, Basye, in the presence of the witnesses Denman and Hotchkiss, said, "if he caught Mr. Wright around his place again he would put a load of shot into him." The plaintiff in error, as well as both Denman and Hotchkiss, upon being interrogated upon the witness stand, testified positively that no threat of any kind was made by Basye concerning the deceased at the time and place stated by Riley, but that the only threats made were of and concerning one Barnes. It further appears in evidence that the deceased was indebted to the plaintiff in error in the sum of \$10 for painting a buggy, and that upon the day previous

to the shooting the account was presented by Basye's attorney to Wright, and payment thereof demanded, and that the latter, in an angry manner, refused to pay it then, saying, "he was not done with Basye yet, and that he would settle with him to-morrow." It was shown by the testimony of several witnesses that within a few days of the tragedy the deceased had frequently made threats that he would run Basye out of town, also that the deceased had borrowed a revolver of one Barnes, which fact, together with the threats made by Wright, were communicated to the plaintiff in error the evening preceding the shooting. The state introduced evidence tending to show that the deceased left home about 9 o'clock on the morning the fatal shot was fired, saying he was going to Basye's to pay him for painting the buggy. The only evidence as to what took place after he arrived at the place of abode of the plaintiff in error, and the facts and circumstances surrounding the killing, consists of the dying declarations of Wright, the testimony of the accused and his admissions or confessions. At least nine witnesses testified to the dying declarations of Wright, and their testimony is substantially the same, and to the effect that the deceased went over to Basye's rooms to pay him what he owed him, that he made a tender of the money, that Basye ordered him out of the room, and as deceased was leaving he shot him. The plaintiff in error testified that D. O. White came to his rooms on the morning of the 14th of December to settle an account, and after the business was transacted White went away, but before he did so Wright, the deceased, knocked at the door and was admitted by Basye, who greeted him with "Good morning," asked him in, gave him a chair and he sat down near the stove. During the five or six minutes that White remained after Wright arrived there was no other conversation between Basye and the deceased. The foregoing testimony of the plaintiff in error is fully corroborated in every particular by the evidence of

White, who was a witness in behalf of the state. The accused further testified that when White went away he (witness) put on his overcoat and overshoes, and then turned to the deceased and asked him what he was going to do about the buggy. To this inquiry the deceased replied by asking Basye what he was going to do, and the latter answered he did not know, that his lawyer had advised him to go and get the buggy and put it in the shop; that "Wright jumped up then where he was, holding the chair in his hand, and spoke in a very violent manner to me and said, 'I will be God-damned if you will. I would like to see either you or your lawyer get that buggy,' and then he grabbed up a piece of a chunk and commenced to shake it over my head. At that time I started to get to the door. I backed myself over very near the door, and he was backing over towards the door too, and he started to put his hand back on his hip, or made an effort to do that as he was going out, and I did not think it was right for him to go on that way, and he made an effort to strike me. I stepped back and picked up the poker, whereupon the deceased made a motion at me with something in his hand and says, 'You drop that or I will drop you,' and I done so. I stepped back a few steps and the thought occurred to me, and I reached around the corner and got my gun. I brought it around in front of me to a guard. To bring it to a guard is to bring the gun in front in a motion ready to fire. I told him to get out of the room. I told him that repeatedly. I repeated that three or four times and told him to keep his hands up. He stepped out in the hall and remained there. Well, he says to me, 'I have papers to serve on you, and I am going to serve them on you,' and he smacked his hand around over his hip pocket, and I threwed the gun up and she went off." There was likewise introduced on the trial evidence tending to show that Basye was a person of small stature, peaceable, quiet and inoffensive, and that the deceased was a large, strong man.

There are other circumstances appearing in the proofs introduced tending to strengthen the theory of the prosecution, and also that of the defense, which we will not set out.

The petition in error contains eighty-three assignments of error, several of which are not urged in the argument, and it is not deemed necessary that we notice or consider all the exceptions relied upon by the prisoner in his brief, but only the most important questions arising upon the record will receive attention at our hands.

J. E. Reed, Alvin Tracy, and Barney Schroeder were separately called and examined both by counsel for the state and the accused touching their qualifications to sit as jurors in the cause. During such examination it was disclosed that each had read newspaper accounts or statements of the tragedy, and thereupon to each was propounded by defendant's counsel the following question: "Have you formed any opinion or conclusion in your own mind as to whether or not the defendant was guilty, or whether or not the crime of murder had been committed?" The county attorney objected as not a proper *voir dire* question, which objection was sustained by the court, and exception was taken by the defendant. Of this ruling he now complains, and is made the basis of the sixth, tenth, and sixteenth assignments of error. We think the question propounded to the jurors was pertinent and proper and they should have been allowed to answer it. One object of the *voir dire* examination is to ascertain whether the mind of the venire-man is entirely free from bias, or prejudice, and whether he would make a competent juror. But the purpose of such examination is not alone to ascertain whether sufficient grounds for challenge for cause exist, but as well to enable the accused to properly exercise his right to challenge peremptorily. For the purpose of ascertaining the real condition of the mind of the venire-man, a wide range of inquiry is generally permissible. The court should always exercise a

sound legal discretion in respect to the pertinency of the question put to the juror, as well as to the limits to which the examination shall be extended. To constitute prejudicial error it must clearly appear that there has been an abuse of discretion in refusing to allow questions to be answered. In 1 Thompson, Trials, sec. 101, the author says: "Within reasonable limits, each party has a right to put pertinent questions to show, not only that there exist proper grounds for a challenge for cause, but to elicit facts to enable him to decide whether or not he will exercise his right to peremptory challenge." The supreme court of Michigan, speaking through Judge Champlin, in *Monaghan v. Agricultural Fire Ins. Co.*, 18 N. W. Rep., 797, in passing upon the scope of a *voir dire* examination uses this language: "It is the evident intent of the law to secure a jury that shall come to the consideration of the case unaffected by any previous judgment, opinion, or bias, with respect either to the parties or subject-matter in controversy, and it is important to the rights of parties that they may be permitted inquiries which may be the means of discovering facts which will justify the exclusion of a juror. The success of a challenge depends upon eliciting such information from the juror himself, as well as from other sources, as to his state or condition of mind, as will enable a judgment to be formed by the court as to his competency. For this purpose the law subjects the juror to an examination on oath, when questions are put to test his competency. If the juror had been permitted to answer the question, and he had replied that he would, in the case put, lean in favor of the plaintiff or against the defendant, can it be doubted that he could have been challenged for cause? He would have shown himself to have been disqualified, and no statement from him that he could render an impartial verdict would have removed the disqualification. * * * A party has a right to a certain number of peremptory challenges, and in order to exercise this right understandingly

it is proper for him to ascertain as nearly as practicable the disposition of the juror towards him, and towards the subject-matter in controversy; and any inquiry within reasonable limits which tends to bring to light any bias or prejudice entertained by a juror is proper." The doctrine is sustained by *Chicago & A. R. Co. v. Buttolf*, 66 Ill., 347; *Watson v. Whitney*, 23 Cal., 376; *State v. Godfrey*, Brayt. [Vt.], 170; *People v. Car Soy*, 57 Cal., 102; *State v. Bresland*, 61 N. W. Rep. [Minn.], 450. There is no room for doubt that the question above indicated which was asked the jurors in this case was proper, at least, for the purpose of determining whether the accused would challenge peremptorily the several jurors, and the trial court erred in sustaining the state's objection to said question.

Upon the *voir dire* examination of the venire-men Olmstead, Francis, and Schroeder the defendant's counsel asked each in substance the following question: "Would the mere fact that the defendant is charged with the commission of a crime have any weight with you, and could you give the same credit to his testimony, were he to go upon the stand, his interest in the result of the suit taken into consideration, that you could give to any other witness?" Complaint is made to the sustaining by the court below of the state's objection to the question quoted. By section 473 of the Criminal Code it is provided: "No person shall be disqualified as a witness in any criminal prosecution, by reason of his interest in the event of the same, as a party or otherwise, or by reason of his conviction of any crime, but such interest or conviction may be shown for the purpose of affecting his credibility. In the trial of all indictments, complaints, and other proceedings against persons charged with the commission of crimes or offenses, the person so charged shall, at his own request, but not otherwise, be deemed a competent witness; nor shall the neglect or refusal to testify create any presumption against him, nor shall any reference be made to, nor any comment

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upon, such neglect or refusal." At common law a person prosecuted for a crime was disqualified from testifying as a witness; but in this state the rule is changed by the statute above set out. Here the defendant in a criminal prosecution may voluntarily take the witness stand and testify, but he cannot be compelled to do so. His interest in the result of the trial may be considered by the jury in determining his credibility and the weight that should be given his testimony. The purpose of the putting of the foregoing question to the jurors was to elicit whether or not the fact that the defendant was accused of crime would militate against him, and whether they could give the same credence, or weight, to his testimony as to that of any other person similarly situated. In other words, it was asked to enable the defendant to determine whether the jurors could sit in the trial of the cause without any bias or prejudice against him, and if it were disclosed that they could not, that he might challenge them peremptorily, if not for cause. The question was within the scope of a legitimate *voir dire* examination. (*Lester v. State*, 2 Tex. App., 432; *State v. McAfee*, 64 N. Car., 339; *People v. Car Soy*, 57 Cal, 102; *Stoots v. State*, 9 N. E. Rep. [Ind.], 380; 1 Thompson, Trials, sec. 103.)

The defendant challenged for cause the jurors Alvin Tracy and N. P. Baker, which challenges were overruled and the defendant excepted to the ruling of the court. Permitting these two jurors to serve, over the objection of the defendant, is covered by the eighth and twentieth assignments of error. These two assignments present the same question of law, and will therefore be considered together. The testimony of the jurors on their *voir dire* was practically the same, that of Baker being substantially as follows:

Q. You heard of this case at the time of the occurrence?

A. Yes, sir.

Q. Have you read the published statements in the local

papers at the time, or about the time, of the occurrence of this affair?

A. I think that I read one that was published in the county papers at the time, I don't know which, or perhaps both.

Q. Do you recollect now the matters contained in that which you read?

A. Yes, sir.

Q. Did the account which you read purport to give in detail a statement of the facts, or only a general statement of what had occurred?

A. Well, I don't know if I could answer that question now.

Q. Did the account which you read profess or undertake to give the details of the occurrence?

A. Yes, sir; I should suppose so.

Q. Did you from that account form an opinion as to the guilt or innocence of the accused?

A. Yes, sir; I think perhaps I did.

Q. You think you did?

A. I think I did.

Q. Was that opinion you had, and is it of such a character as to require evidence primarily, to remove it, or was it only an impression?

A. I should think it was more of an impression at the time.

Q. That is what it amounted to, an impression?

A. That is all.

Q. Did you talk with persons concerning the matter?

A. I don't know whether I did or not.

Q. Did you talk with any person with whom, from the nature of their conversation, or what he said to you, you might conclude, or did conclude that he knew the facts, or that he simply detailed them to you as hearsay?

A. No, sir; I don't know that I ever did.

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Q. Is it your belief that you have talked with no person except persons mostly who talked from hearsay?

A. That would be my impression.

Q. Did you from any such conversation form any opinion as to the guilt or innocence of the accused?

A. No, I can't say that I did.

Q. Now, from what you have heard of this case, and read of it, have you now any opinion as to the guilt or innocence of the person charged with this crime?

A. No, I can't say that I have.

Q. Have you any such impression of the matter as would bias or influence your verdict, after you had heard the testimony and instructions of the court to the jury?

A. No, sir; I don't know that I have.

Mr. Baker also testified that he had no acquaintance either with the defendant or the person murdered.

The cross-examination by Mr. Good, on behalf of the defendant, was substantially as follows:

Q. You have read about the case in the local papers, and possibly in the *Omaha Bee*?

A. Yes, sir.

Q. You have heard some talk with reference to the case?

A. Street conversations perhaps.

Q. The conversations which you heard were conversations between persons from Valparaiso, or any of them from Valparaiso or persons in that vicinity?

A. No, sir. I am not acquainted down in Valparaiso. I think was here on the streets among neighbors.

Q. Do you know whether or not the persons with whom you talked, or heard the conversation, related what were the facts, or what were claimed to be the facts in the case?

A. No, I don't know as to that.

Q. From what you heard and what you read did you form any impression as to what verdict ought to be rendered in this case?

A. That would be owing to the reliance I would put upon it.

Q. How much reliance did you put upon it, Mr. Baker?

A. No, sir; I can't say that I put that much reliance on it.

Q. From what you read and what you heard, did you form any belief, or any bias or prejudice for or against the defendant?

A. No, sir.

Q. Are you conscious at this time, Mr. Baker, of any feeling or bias against the defendant?

A. No, sir.

Q. That impression which you then formed you have now?

A. Yes, sir; I suppose I have.

Q. Is the impression which you now have such as would require some evidence to remove or change it?

A. Yes, sir.

Q. The impression which you have is based upon reading the newspapers, and conversations which you have had and heard upon the subject?

A. Yes, sir.

Re-examined by county attorney:

Q. Notwithstanding this impression, Mr. Baker, can you sit here in the trial of this case as a juror, and impartially try the defendant on the evidence, and instructions of the court, and not have any bias by reason of the impression which you state you have of the matter?

A. Yes, sir; I think I could.

The court took the juror in hand and elicited from him the statement that he then had no opinion as to whether the defendant was guilty or not, and that his information in regard to the matter consisted in reading the accounts of the killing published in the *Wasp* and the *Omaha Bee*.

It is insisted that the case at bar falls squarely within

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the rule announced by this court in *Miller v. State*, 29 Neb., 437. It was there held, following *Curry v. State*, 4 Neb., 550, *Olive v. State*, 11 Neb., 11, and *Cowan v. State*, 22 Neb., 519, that "when a person called to serve as a juror in a criminal case discloses on his *voir dire* that he has an opinion as to the guilt or innocence of the accused, based on rumor and the reading of newspaper accounts of the alleged crime, which will require evidence to remove, a challenge for cause should be sustained, even though he states that he thinks he could render an impartial verdict under the law and evidence." The statute provides, section 468 of the Criminal Code, that in a criminal case a challenge for cause may be made to any person called to serve as a juror for any of the nine grounds which are enumerated, the second of which is as follows: "That he has formed or expressed an opinion as to the guilt or innocence of the accused; *Provided*, That if the juror shall state that he has formed or expressed an opinion as to the guilt or innocence of the accused, the court shall thereupon proceed to examine, on oath, such juror as to the ground of such opinion; and if it shall appear to have been founded upon reading newspaper statements, communications, comments, or reports, or upon rumor, or hearsay, and not upon conversations with witnesses of the transactions, or reading reports of their testimony, or hearing them testify, and the juror shall say on oath that he feels able, notwithstanding such opinion, to render an impartial verdict upon the law and the evidence, the court, if satisfied that said juror is impartial and will render such verdict, may, in its discretion, admit such juror as competent to serve in such case." It is very evident that the purpose of the above provision was to secure to the state and to the accused a fair, impartial, unprejudiced, and unbiased jury in criminal prosecutions, one that will decide the case upon the evidence alone, under the charge of the court, uninfluenced by outside considerations. A juror, who upon his

voir dire discloses that he is biased or prejudiced, or who has a fixed and settled conviction or opinion as to the guilt or innocence of the defendant based upon mere rumor, or the reading of the public press, or founded upon conversations with witnesses of the transaction, is incompetent to serve, and should be rejected, even though he may upon his examination state that he feels able "to render an impartial verdict upon the law and the evidence." This is the true test of disqualification within the meaning of the statute. If upon the whole examination of the juror it is manifest that the opinion formed by him from reading newspaper accounts of the alleged crime or upon rumor is merely hypothetical, or conditional on the truth of the rumor or the newspaper reports read; that he has no settled opinion as to the guilt or innocence of the accused, and that he can render a fair and impartial verdict upon the evidence adduced on the trial, under the instructions of the court, the juror is competent. (*Murphy v. State*, 15 Neb., 383; *Bohanan v. State*, 18 Neb., 57; *Curry v. State*, 5 Neb., 412.) Under the statutes the mere fact that a juror has formed an opinion from what he has heard or read does not disqualify him from acting, nor make him incompetent to serve as a juror. It is only when the venire-man has such a settled opinion, or the examination shows such a state of mind as will preclude him from returning a true verdict upon the evidence submitted on the trial, that he is disqualified. In other words, he is incompetent if he entertains an unqualified or unconditional opinion on the merits of the case, however formed, or an opinion of that fixed character which repels the presumption of innocence of the prisoner. The statute does not in express terms, nor by fair implication, disqualify one from serving as a juror who has read newspaper reports of the commission of the crime. If it did, in this day and age of almost universal reading of the public press, and where the enterprising newspaper man gathers and publishes the events of the day, it would be almost

impossible to secure a competent jury to try any important criminal case. If from the reading of the reports of the commission of crime in the newspapers there is produced in the mind of the juror a settled conviction that what he has read was true and that he had formed a fixed opinion as to the guilt or innocence of the offense charged, then sufficient grounds for challenge for cause exists, since he would not be an impartial juror. Although it is competent and proper to put to a juror questions to elicit from him whether he could lay aside any opinion formed, and decide the case upon the evidence produced on the trial, yet it is the duty and province of the court, and not of the juror, to pass upon and determine the question of capability and whether or not his opinion disqualifies him to act as a juror. This is the plain import of the language of the statute already quoted. Besides, section 469 of the Criminal Code declares: "All challenges for cause shall be tried by the court, on the oath of the person challenged, or on any other evidence," etc. Manifestly, it is the duty of the trial court to decide as to the fact of qualification of the person challenged from a consideration of his entire examination and such other evidence and circumstances as tend to throw light upon the subject. The trial court in determining the fact of qualification is not confined to the answers of the juror alone, but may consider his appearance and general demeanor while undergoing examination. A venire-man might answer that notwithstanding his opinion he could decide the case on the evidence and law, and that he would not be influenced by prior outside information which he has obtained, and yet his examination might disclose facts that contradict this statement. If it did, he is disqualified. The rule for which counsel for the prisoner contends, if carried to its logical conclusion, will prevent most persons from serving as jurors, who have heard or read anything of the purported facts bearing upon the issue to be tried. In *Miller v. State*, *supra*, it was disclosed that the opinion

formed by the juror from reading newspaper accounts of the crime and from rumor was so fixed that he could not give the defendant a fair and impartial trial, although he honestly believed he could decide the cause upon the testimony alone. The proper distinction was not drawn in that and some other prior cases in this court between a hypothetical or conditional opinion and an unconditional and fixed one. A careful perusal of the examinations of the jurors Tracy and Baker discloses that they were not acquainted with either the deceased or the defendant; that they entertained no fixed or settled conviction, if indeed any, as to the guilt or innocence of the accused, but that they could render a fair and impartial verdict according to the evidence. The challenges for cause to the jurors were properly overruled.

J. D. Hare, William Giffin, and G. R. McCormick were separately called and examined as witnesses on behalf of the state. The defendant at the time objected to their testifying on the ground that their full Christian names were not written upon the back of the information, the surnames and initials of the Christian names of these witnesses being indorsed thereon. The identical question thus presented by the twenty-second, fortieth, and forty-first assignments of error was passed upon during the present term in *Perry v. State*, 44 Neb., 414, where it was held that such an indorsement of the names of witnesses upon the information is a sufficient compliance with the requirements of the statute. No good or sufficient reason having been suggested in the brief of counsel for disturbing the rule announced in the case mentioned, the decision will be followed herein. Therefore, defendant's objections to the above named witnesses being sworn and examined are not well taken. *

Drs. Hare and Guttery, who conducted the *post mortem* examination of the body of Wright, were permitted, over the objections of the defendant, to give a particular and

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minute description of the gun shot wounds,—the size, depth, and location of each. These rulings are the foundation of the twenty-third and twenty-fifth assignments. The testimony was clearly material and competent as tending to establish the fact that death resulted from the wounds. The proposition is too plain to require elaboration or argument.

Six assignments of error, the twenty-fourth, twenty-seventh, twenty-eighth, thirty-first, thirty-third, and thirty-sixth, are predicated upon the permitting of as many witnesses called by the state to testify as to the intensity of the pain suffered by the deceased after the wounds were inflicted. It is strenuously argued that this testimony was inadmissible and was prejudicial to the prisoner, for the reason that the jury might infer therefrom that it was proper to consider such testimony in determining the degree of the offense charged. Each of the six witnesses testified to certain dying declarations of the deceased, over the objections of the defendant that no proper foundation had been laid for this class of testimony, in that it was not shown that the party making them at the time believed himself *in extremis*. The competency of dying declarations is a question for the court to determine in view of the circumstances under which they were made. In order to be admissible it is essential that the party offering them establish that they were made under a sense of impending death. (*Rakes v. People*, 2 Neb., 157; *Fitzgerald v. State*, 11 Neb., 577; *Binfield v. State*, 15 Neb., 484.) The physical, as well as mental, condition of the deceased at the time of the making of the declaration is admissible, not only as tending to prove that they were made *in extremis*, but as affecting the weight which should be given them by the jury. While it is true the testimony relating to the degree of pain and suffering of the deceased was introduced after the witnesses had detailed the declarations, yet there should not be a new trial awarded for that reason,

since the order of introducing evidence is discretionary with the trial court. (*Clough v. State*, 7 Neb., 323; *Village of Ponca v. Crawford*, 18 Neb., 551; *McCleneghan v. Reid*, 34 Neb., 472; *Consaul v. Sheldon*, 35 Neb., 247.) The record in the case at bar fails to show that the defendant has been deprived of a substantial right or that there has been an abuse of discretion in the order in which the proofs were put in.

Several assignments of error refer to permitting different witnesses to testify to verbal confessions made by the defendant. Objections were made to the introduction of these admissions or confessions on the ground that no foundation was laid. The record, without the least contradiction, discloses that the confessions proved upon the trial were made on the day of the tragedy, before the defendant was arrested, and under circumstances of so conclusive a nature as to establish beyond controversy that they were voluntary, and without inducement of any kind being held out to the defendant to obtain them. They were made on the defendant's own offer, without question or suggestion, and without the influence of hope or fear, and were therefore admissible. (*Furst v. State*, 31 Neb., 403.)

C. S. Allen, an attorney residing at Valparaiso, testified to a conversation had with the defendant, in which the latter detailed the shooting and the circumstances surrounding the parties at the time. Objection was made by the defendant to this testimony on the ground that the communication was privileged, which was overruled, and the testimony admitted. A reversal is sought on that ground. Subdivision 4, section 328, of the Code of Civil Procedure, provides that testimony cannot be given by "an attorney, concerning any communication made to him by his client in that relation or his advice thereon, without the client's consent in open court or in writing produced in court." Section 333 declares: "No practicing attorney * * * shall be allowed, in giving testimony, to disclose any con-

fidential communication, properly intrusted to him in his professional capacity, and necessary and proper to enable him to discharge the functions of his office according to the usual course of practice or discipline." The foregoing provisions have heretofore been considered by this court, and it has been held that any confidential communication made by a party to an attorney is privileged, and cannot be given in evidence unless the client consents thereto. (*Romberg v. Hughes*, 18 Neb., 579; *Nelson v. Becker*, 32 Neb., 99.) In order to entitle one to the protection of the statute which renders the communication to a lawyer privileged it is obvious that the relation of client and attorney must have existed between them. Were the admissions testified to by Mr. Allen made by the defendant in confidential consultation with him as his attorney? This is a question of fact to be determined from the evidence introduced on that issue. It is undisputed that shortly after the shooting the defendant went to the law office of Mr. Allen, where, in the presence of J. K. Vandemark, an attorney of the same town, the conversation in question occurred. It was also shown without contradiction that Mr. Allen had never at any time been employed by the defendant, although on two previous occasions Mr. Basye went to see him to engage him to look after some legal business, but Mr. Allen declined to take the cases or to be retained. The evidence of the latter shows at the time the admissions were made the defendant did not seek his counsel or ask to engage him; that nothing was said from which the inference could be drawn that the accused desired to consult with him; that he gave him no advice, although Mr. Vandemark told him what to do. The testimony of Mr. Vandemark was to the effect that it was the witness' understanding that Basye came to employ Mr. Allen, and that the latter and the witness both counseled him. The evidence is ample to justify the trial court in reaching the conclusion that the relation of attorney and client

did not exist between Allen and the defendant, and that the communication was not made by the latter confidentially to obtain Mr. Allen as his counsel. It is argued that the communication is privileged, since Mr. Vandemark gave advice in the capacity of an attorney, and that Mr. Allen could not disclose the confession, because he happened to be present at the time. Wharton, Criminal Evidence, sec. 496, and *Bowers v. State*, 29 O. St., 542, are cited by counsel in support of their contention. These authorities are not in point. Mr. Wharton, after stating the general rule in regard to communications made by a client to his attorney being privileged, says: "Nor does the privilege cease to operate because a friend was present with the client at the interview." (Wharton, Criminal Evidence [8th ed.], sec. 496.) To the same effect is *Bowers v. State*, *supra*. The doctrine has no application to the facts in the case at bar. Under the foregoing authorities an attorney will not be permitted to disclose the admissions or communications of his client, against the consent of the latter, because the same were made in the presence of a third party. But it by no means follows that such third party, who was in no way connected with the attorney or client, cannot testify as to such admissions. Neither is the attorney permitted, nor can the client be compelled, to disclose communications or statements made by the latter to the former, but further than this the law affords no protection. Where, at least in the absence of fraud and collusion, a client makes statements to his attorney in the presence of a third party, such person is not prohibited by statute from testifying to such statement. (*State v. Sterrett*, 68 Ia., 76; *Jackson v. French*, 3 Wend [N. Y.], 339; *Hatton v. Robinson*, 14 Pick. [Mass.], 416; *Perry v. State*, 38 Pac. Rep. [Idaho], 655; *People v. Buchanan*, 39 N. E. Rep. [N. Y.], 846. It follows from what has been said that the defendant was not entitled to have the statements made by Basye to Allen excluded as a privileged communication.

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Upon the trial the defendant offered to prove by two witnesses, D. O. White and James Casement, while they were upon the stand, that his reputation for honesty and integrity was good in the community where he lived. The court excluded the offered testimony, and of which action complaint is now made. The text-books and the adjudicated cases agree that in a criminal trial evidence of the previous good character of the defendant is always admissible as a fact for the jury to consider in determining the question of guilt or innocence. The character the defendant is entitled to prove must be consistent with the offense charged. For instance, in a prosecution for murder his general reputation as a peaceable and quiet man is competent, but not his character for honesty and integrity. Had this prosecution been for larceny, then the offered evidence would have been admissible. (Wharton, Criminal Evidence, sec. 60 and note 3.) Several witnesses were introduced by the defendant who testified to his general reputation as a peaceable and law-abiding citizen. On cross-examination each, over the objection and exception of the defendant, stated that he had heard of the defendant having a quarrel with, and striking, a man several years before while he resided near Raymond. It is argued that under the rule announced in *Olive v. State*, 11 Neb., 1, and *Patterson v. State*, 41 Neb., 538, the admission in evidence on cross-examination of specific facts tending to show the accused's reputation to be bad was erroneous. The precise point here raised was involved in and passed upon by the court in the cases mentioned above, in each of which it was held that the admission of such testimony upon cross-examination was reversible error. In the syllabus in each case it was correctly decided that where a defendant in a criminal case has introduced evidence of his good character or reputation, the state in reply cannot prove particular facts in order to show it to be bad. This rule is a wise one, for the obvious reason that the accused is not expected to be

prepared to meet a distinct and specific charge. The principle, however, was not correctly applied to the facts in the two Nebraska cases. It was upon cross-examination that the witness was interrogated as to specific matters. While particular facts are inadmissible in evidence upon direct examination for the purpose of sustaining or overthrowing character, yet this doctrine does not extend to cross-examination. It is firmly settled by the adjudications in this country that upon cross-examination of a witness who has testified to general reputation questions may be propounded for the purpose of eliciting the source of the witness' information, and particular facts may be called to his attention, and asked whether he ever heard them. This is permissible not for the purpose of establishing the truth of such facts, but to test the witness' credibility, and to enable the jury to ascertain the weight to be given to his testimony. The extent of the cross-examination of a witness must be left to the discretion of the trial court. The questions put to the several witnesses were within the scope of a legitimate cross-examination, and there was no abuse of discretion in permitting them to be answered. (*State v. Arnold*, 12 Ia., 480; *Oliver v. Pate*, 43 Ind., 132; *People v. Annis*, 13 Mich., 511; *Rex v. Martin*, 6 C. & P. [Eng.], 562; *Leonard v. Allen*, 11 Cush. [Mass.], 241; *Ingram v. State*, 67 Ala., 67; *Tesney v. State*, 77 Ala., 33; *De Arman v. State*, 71 Ala., 357; *Jackson v. State*, 78 Ala., 471; *State v. Jerome*, 33 Conn., 265; *Carpenter v. Blake*, 10 Hun [N. Y.], 358; Phillips, Evidence, 352; 1 Best, Evidence, sec. 261.)

Another contention is that the court erred in refusing to allow the defendant to prove that the deceased was a quarrelsome and irritable man, and that he had made threats against the defendant, which were communicated to the accused the evening prior to the shooting. This evidence ought to have been received. In a homicide case, where it is claimed that the killing was in self-defense, evidence

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of the quarrelsome disposition of the deceased and the threats are proper elements for the jury to consider in determining whether the defendant was justified in taking the life of the deceased. In *State v. Zellers*, 2 Halst. [N. J. Law], 230*, the court say: "Inasmuch as the distinction between murder and manslaughter depends upon the impulse of the mind with which the act was committed, every circumstance which goes to show the feeling of the parties towards each other may be proper. That temper, which at one time might not be excited, might, under the excitement of other circumstances, be more easily roused, and, therefore, it may be received by the jury to show the state of mind of the parties." In *Brownell v. People*, 38 Mich., 735, Campbell, C. J., speaking for the court, observes: "The defense rested upon the grounds, among others, that Brownell used a pistol to repel an assault which was not only violent in fact, but made by a powerful man of dangerous temper, who had made threats against him. Looking at the case in a common-sense light, we cannot avoid seeing that any person would naturally be more in fear of a man of that sort than of a quiet or weaker man, and would, in case of an attack from him, feel a greater need of extreme measures to protect himself, and resist his adversary. Inasmuch as every one finds his excuse in facts as they honestly appear to him, such important facts as these cannot be disregarded." *State v. Tackett*, 1 Hawks [N. Car.], 210, was a prosecution for the crime of murder. The defendant set up self-defense. The supreme court on a review of the case uses this language: "If the general behavior of the deceased was marked with turbulence and insolence, it might, in connection with the threats, quarrels, and existing causes of resentment he had against the prisoner, increase the probability that the latter had acted under strong and legal provocation." In *State v. Tarter*, 37 Pac. Rep. [Ore.], 53, the supreme court of Oregon say: "Where the circumstances raise a question of self-defense,

evidence of uncommunicated threats, recently made, are admissible for the purpose of showing the motive of the deceased and the nature and character of the assault. So, also, proof of threats not communicated is often admitted for the purpose of corroborating evidence of those communicated; and likewise, where it is doubtful from the evidence which party commenced the affray, communicated threats are admissible to show who was probably the first assailant." As sustaining the doctrine that the character and disposition of the deceased, and the threats made by him against the prisoner, were admissible in evidence see Wharton Criminal Evidence, secs. 72-78, and cases there cited; 2 Thompson, Trials, secs. 2173, 2174, and cases cited; *Hurd v. People*, 25 Mich., 405. It is true that more than one witness for the defense did testify to threats made by the deceased, but that is no reason why the witness Espy should not have been permitted to detail other similar threats which he heard the deceased utter concerning the accused recently before the tragedy.

There are errors alleged upon the admission and exclusion of testimony, but as they are not likely to be repeated upon another trial, they will not be considered by us. So, too, the giving of a number of instructions, as well as the refusal of the defendant's request to charge, are assigned as error, but we will not stop to review them, although an examination shows that some of the instructions given on the subject of self-defense were erroneous. We do not, however, place a reversal upon that ground. For the errors already indicated the judgment is reversed, and the cause remanded.

REVERSED AND REMANDED.

HERMAN KOUNTZE V. JOHN H. ERCK.

FILED JUNE 18, 1895. No. 7749.

1. **Mortgages: FORECLOSURE: DEFICIENCY JUDGMENT: SUPERSedeas BONDS.** Where, upon the confirmation of sale of real estate made under a decree foreclosing a mortgage, the court renders a judgment for the amount of the deficiency and awards execution therefor, the penalty of a supersedeas bond on appeal from the order of confirmation is not required to be double the amount of the deficiency judgment, but must be in such sum as the court or judge shall fix, and conditioned as prescribed by the third subdivision of section 677 of the Code of Civil Procedure.
2. ———: ———: ———: ———. Where a proper supersedeas bond for an appeal from an order of confirmation is duly filed and approved, execution cannot be issued upon the deficiency judgment until the bond is set aside or modified, or the appellant fails to perfect his appeal, or the appeal is determined. *State Bank v. Green*, 8 Neb., 297; 10 Neb., 130, followed.

MOTION by plaintiff to vacate a bond given to supersede confirmation of sale and deficiency judgment rendered by the district court of Douglas county, and to quash the bill of exceptions. The case was heard below before AMBROSE, J. *Motion overruled in part and sustained in part.*

Winfield S. Strawn, for the motion.

George O. Calder, contra.

NORVAL, C. J.

An action was instituted in the court below by Herman Kountze against John H. Erck to foreclose a mortgage on certain real estate in the city of Omaha, executed by the defendant to the plaintiff to secure the payment of a promissory note calling for \$7,775.62, with seven per cent interest thereon from date thereof until paid. Subse-

quently, and on the 30th day of December, 1893, the court found that there was due the plaintiff upon his note and mortgage the sum of \$8,589.75, and that he was entitled to a foreclosure of the mortgage as prayed. Judgment and decree were entered in accordance with these findings, and a special master commissioner was appointed to make the sale. The defendant filed with the clerk a request for stay of the order of sale, and after the expiration of the stay, an order of sale was issued, and the property sold thereunder. The defendant presented objections to the confirmation of the sale, which the court overruled, the sale was confirmed, and deficiency judgment was rendered in favor of the plaintiff and against the defendant in the sum of \$5,057.52. To all of which the defendant excepted. Time was given him in which to reduce his exceptions to writing, and on his application the court fixed the amount of supersedeas bond in the sum of \$100 to be given to stay the execution of the order of confirmation. On the next day the defendant, with one surety, entered into a supersedeas bond to the plaintiff in the above sum of \$100, conditioned "that if the said John H. Erek shall prosecute such appeal without delay and will not during the pendency of the appeal commit or suffer to be committed any waste upon the real estate in controversy, then the obligation shall be null and void, otherwise to remain in full force and effect." This bond was presented to, filed with, and approved by the clerk of the district court as by law provided. Subsequently, the plaintiff submitted a motion to vacate said order fixing the amount of the supersedeas bond and to require the defendant to give bond with approved surety in the sum of double the amount of deficiency judgment entered, which motion the court overruled, and the plaintiff excepted thereto. The plaintiff has procured and filed in this court a transcript of the proceedings, together with the defendant's original bill of exceptions, and had the case docketed as an appeal.

There is submitted for our determination the following motion presented by the plaintiff, to-wit:

"1. To vacate the bond herein given to supersede the confirmation of sale and deficiency judgment herein rendered, for the reason that the amount of said bond is wholly inadequate to meet the case and wholly insufficient to protect the interest thereby superseded.

"2. Subject to the foregoing, to require from the appellant an approved bond in double the amount of the deficiency judgment herein rendered, and one conditioned to pay interest on the amount found due appellee—all as a condition of superseding the order of confirmation of sale and the judgment rendered thereon.

"3. Subject to both the preceding provisions, to order that the bond given shall not operate as a supersedeas of the deficiency judgment herein, even if held sufficient to supersede the order of confirmation of the sale.

"4. That if such bond is held of any value in this case as to the amount, another bond be required to be given conditioned to pay interest upon the amount of the sale till the final decision of this case.

"5. To strike from the record and files in this case the pretended bill of exceptions, for the reasons: (1) That the same was not, within ten days after being returned by plaintiff with his proposed amendments thereto, presented or offered to be presented by the party seeking the settlement of said proposed bill, to the judge who heard the cause, upon five days' notice or otherwise; (2) that said pretended bill of exceptions was not made up, or offered to be made up of the evidence used on the motion to set aside the appraisal made in this case, or objections to the confirmation of said sale; and there is no law allowing the making a bill of exceptions of alleged copies of evidence."

The questions presented for consideration by the first four subdivisions of the above motion involve the construction of section 677 of the Code of Civil Procedure, which pro-

vides for the giving of supersedeas bonds in appeals in actions in equity. This section declares: "No appeal in any case in equity, now pending and undetermined, or which shall hereafter be brought, shall operate as a supersedeas, unless the appellant, or appellants, shall, within twenty days next after the rendition of such judgment or decree, or the making of such final order, execute to the adverse party a bond with one or more sureties as follows: First—When the judgment, decree, or final order appealed from, directs the payment of money, the bond shall be in double the amount of the judgment, decree, or final order, conditioned that the appellant, or appellants, will prosecute such appeal without delay, and pay all condemnation money and costs which may be found against him, or them, on the final determination of the cause in the supreme court. Second—When the judgment, decree, or final order directs the execution of a conveyance or other instrument the bond shall be in such sum as shall be prescribed by the district court, or judge thereof in vacation, conditioned that the appellant, or appellants, will prosecute such appeal without delay, and will abide and perform the judgment or decree rendered, or final order which shall be made by the supreme court in the cause. Third—When the judgment, decree, or order directs the sale or delivery of possession of real estate, the bond shall be in such sum as the court, or judge thereof in vacation, shall prescribe, conditioned that the appellant, or appellants, will prosecute such appeal without delay, and will not during the pendency of such appeal commit, or suffer to be committed, any waste upon such real estate. Fourth—When the judgment, decree, or final order dissolves or modifies any order of injunction which has been, or hereafter may be granted, the supersedeas bond shall be in such reasonable sum as the court, or judge thereof in vacation, shall prescribe, conditioned that the appellant, or appellants, will prosecute such appeal without delay, and will pay all costs which may be found against him, or them,

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on the final determination of the cause in the supreme court; and such supersedeas bond shall stay the doing of the act or acts sought to be restrained by the suit, and continue such injunction in force until the case is heard and finally determined in the supreme court. The undertaking given upon the allowance of the injunction shall be and remain in effect until it is finally decided whether or not the injunction ought to have been granted."

The contention of plaintiff is that the first subdivision of the foregoing section governs in cases like the one before us, and that the penalty in the bond must be double the amount of the deficiency judgment rendered, and the bond should be conditioned as by said subdivision provided. It requires no argument to show that where a party appeals from a judgment or decree for the payment of money, in order to supersede the same he must execute a bond to the adverse party with one or more sureties in double the amount of the judgment or decree, conditioned that he "will prosecute such appeal without delay, and pay all condemnation money and costs which may be found against him, or them, on the final determination of the cause in the supreme court." Such is the plain and obvious import of the statute. It is equally clear that the third subdivision of the section controls the amount of the penalty and the condition of a supersedeas bond in an appeal from a decree of foreclosure of mortgaged premises and from a mere order confirming the sale of real property, and in either of which cases the bond must be conditioned like the one before us, and the amount of the penalty is to be fixed, in the discretion of the court or judge. The defendant has not appealed, nor attempted to do so, from the amount of the deficiency judgment, but merely from the order confirming the sale of the mortgaged premises, which order does not direct the payment of any sum of money whatever. It is true a deficiency judgment was rendered in the case at the same time, but the defendant had a perfect right to have either

or both reviewed, at his election. Having appealed alone from the order of confirmation we are entirely satisfied that the defendant was not required to give a supersedeas bond in double the amount of the judgment rendered for the deficiency remaining after the sale of the property, and further that the bond given is conditioned as prescribed by statute. We entertain no doubt that this court has the power to require the penalty of the bond to be increased, and would raise the amount were we satisfied that the sum fixed by the trial court was wholly insufficient to cover the damages which the plaintiff would likely sustain if the order appealed from should be affirmed. The record shows that the premises in controversy are vacant and unimproved, and certainly the defendant could neither "commit, or suffer to be committed," any great amount of waste upon the property. This is conceded by appellee. The amount of the bond is small, but we cannot, in the absence of any showing, say that it is inadequate or that there was an abuse of discretion by the trial court in fixing the penalty.

It is claimed that the bond in question does not operate to stay the issuance of an execution upon the deficiency judgment. The court as now constituted is strongly of the belief that the doctrine contended for is sound, and, if the question were an open one in this state, it would, doubtless, so hold, but the point has been set at rest, and that, too, adversely to the contention of this plaintiff, by a decision of this court pronounced in 1879, in *State Bank of Nebraska v. Green*, 8 Neb., 297, but which counsel insists should be overruled. That was an action to foreclose a real estate mortgage, in which a decree for the sum of \$10,509.24, and costs and attorney's fees, was rendered in favor of the plaintiff. A sale was had under the decree, which was confirmed by the court, and a judgment for the deficiency was rendered on December 6, 1877, against the defendants for the sum of \$9,944.73. A supersedeas bond was fixed by the court at \$2,000 and the next day such a

bond was executed by Green with sureties, and the same was approved by the clerk of the district court. Subsequently, in March, 1878, execution for the amount of the deficiency judgment was issued and levied upon certain real estate belonging to Green, which writ was returned without a sale having been made, and orders of sale were thereafter issued, under one of which the property was sold and the sale confirmed. The confirmation was resisted on the ground that at the time the writ was issued a good and sufficient supersedeas bond was on file. Green appealed from the order of confirmation. It was contended by the appellee in that case, as in this, that the supersedeas bond did not stay the issuance of an execution upon the deficiency judgment, because the bond is not such as is required by statute. The court, after quoting section 3 of the act "to provide for appeals in actions in equity," section 677 of the Code of Civil Procedure, say: "The statute requires the appellant, in order to stay the operation of the judgment, to file a proper bond, approved by the clerk, within twenty days from the time of the rendition of the judgment, order, or decree. Upon the bond being filed and approved, the power of the court below to proceed in the case is suspended until the bond is set aside, modified, or the appellant fails to perfect his appeal within the time required by the statute. * * * The amount of the bond was evidently fixed by the court under the provisions of the third subdivision of section three, as the effect of the confirmation of the sale would be to divest the defendant of the possession of the real estate in question. This being the case, the appeal in that case was taken from the order confirming the sale. The amount of deficiency is contingent altogether upon the amount realized from the sale of the real estate. If, therefore, the order confirming the sale should be reversed, no order of execution for the deficiency could be made until a resale of the premises, as the amount could not be ascertained. This evidently was

the view taken by the court below, and we think it correct. If any particular objection existed against the bond it should have been made in the first instance in the court below; but the bond, apparently, is sufficient in form and amount, and it cannot be treated as void. * * * It follows that Green, having given the necessary bond for an appeal, the power of the district court to issue execution on the judgment was for the time being suspended, and the clerk had no authority to issue the execution and orders of sale. The court therefore erred in confirming the sale." The foregoing decision was adhered to in *State Bank of Nebraska v. Green*, 10 Neb., 130, and not having been questioned until now, these adjudications have become a rule of property, which we feel bound to follow until changed by legislative enactment. True, the section construed in 8th and 10th Nebraska has been since amended, but the only change has been the addition of the fourth subdivision of section 677 of the Code as now existing, which does not in any manner affect the question under review.

The remainder of the plaintiff's motion relating to the bill of exceptions will be sustained, but not upon the grounds assigned in the motion. The plaintiff procured the transcript to be made and had the cause docketed in this court, and he has an undoubted right to withdraw from the files the whole or any part of his own transcript. It was proper, as well as necessary, to file here a record upon which to move this court upon the subject of the bond, and the usual transcript upon appeal, such as appellee has filed herein, naturally constitutes the best of records in such cases. But he will not be permitted to file the defendant's bill of exceptions in this court for the purpose of moving to have the same quashed. The defendant may never claim any rights under the bill of exceptions. When he does, it will be time enough for the plaintiff to attack the validity of the bill.

JUDGMENT ACCORDINGLY.

FRANK S. PEARCE V. ALEXANDER S. MCKAY.

FILED JUNE 18, 1895. No. 5976.

1. **Trial: REVIEW.** The admission of incompetent or irrelevant testimony in a trial without a jury is not reversible error.
2. **Pleadings: OBJECTIONS: REVIEW.** Objection that a pleading does not state sufficient facts to constitute a cause of action or defense not raised in the trial court, nor in the petition in error, will not ordinarily be reviewed.
3. **Assignments of Error: NEW TRIAL.** An assignment in a petition in error for the denial of the motion for a new trial is bad which fails to specify to which of the several points made by the motion the assignment applies.
4. **Review: CONFLICTING EVIDENCE.** Where the evidence is conflicting the findings of the trial court are conclusive.

ERROR from the district court of Saline county. Tried below before BUSH, J.

A. A. Kendall and *F. I. Foss*, for plaintiff in error.

J. D. Pope and *E. E. McGintie*, *contra*.

NORVAL, C. J.

Plaintiff in error was plaintiff in the court below, and from a judgment dismissing the action he prosecutes error.

The first two assignments in the petition in error are based upon the admission of certain testimony given by the defendant, over the objections and exceptions of the plaintiff. We will not here reproduce the testimony claimed to be objectionable, nor determine whether the same was improperly admitted. Conceding, as contended, that the testimony was wrongfully received, it is not sufficient ground for reversal, inasmuch as the cause was tried to the court without a jury. This is the established doctrine of this court. (*Enyeart v. Davis*, 17 Neb., 228; *McConahey v. McCona-*

hey, 21 Neb., 463; *Willard v. Foster*, 24 Neb., 213; *Richardson v. Doty*, 25 Neb., 424; *Ward v. Parlin*, 30 Neb., 376; *Stabler v. Gund*, 35 Neb., 651; *Whipple v. Fowler*, 41 Neb., 675.)

Complaint is made in the brief that the answer does not state sufficient facts to constitute a defense to the action. This objection was not raised in the court below, nor in the petition in error, hence the objection will not be considered by us. Errors relied upon for a reversal must be specifically assigned in the petition in error.

The next assignment that the court erred in denying the plaintiff's motion for a new trial is insufficient, because it fails to specify to which of the several points contained in the motion the assignment refers. (*Glaze v. Parcel*, 40 Neb., 732.)

It is finally insisted that the findings and judgment are not sustained by sufficient evidence. The record discloses that in December, 1888, the plaintiff in error and one William J. Armstrong formed a partnership under the name of Armstrong & Pearce, for the purpose of buying, feeding, and selling cattle and hogs, the place of business agreed upon being Palmer, Nebraska. By the terms of the partnership, the parties were to share the profits and losses equally. Armstrong put into the venture \$150, and Pearce nothing. The partnership continued until some time in January, 1889, when Armstrong died, leaving plaintiff the sole surviving partner. At the time of Armstrong's death the firm was indebted to the Deposit Bank of Palmer, for moneys loaned, in the sum of several hundred dollars, and there was also due the partnership from Parkhurst, Hooper & Parker, of South Omaha, for hogs consigned to and sold by them, an amount aggregating more than \$500. The aforesaid bank held the bill of lading for the shipment of stock by Armstrong & Pearce to the South Omaha firm. Armstrong was a nephew of the defendant McKay, and during the last illness of the former he requested the latter to look after and settle up his business

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affairs. Afterwards, McKay, through the law firm of Hall, McCulloch & English, brought suit in the county court of Douglas county in the name of Frank S. Pearce, as surviving partner of the firm of Armstrong & Pearce, against Parkhurst, Hooper & Parker to recover the amount of their indebtedness aforesaid, where judgment was obtained against the defendants therein in the sum of \$530.33, which was subsequently paid, and the amount thereof, less \$114, the fees and expenses of said attorneys, was remitted to McKay. It is to recover the amount thus collected that this suit was brought. It is shown by uncontradicted testimony that the defendant expended in the prosecution of said action in the county court \$31; that the bank at Palmer, after the death of Armstrong, began to urge the payment of the amount due it; that plaintiff being insolvent could not pay the same, and the only assets of the firm of Armstrong & Pearce was the amount due it from the South Omaha commission men; that McKay paid or deposited in said bank of his own money the sum of \$420, to be applied on the indebtedness of Armstrong & Pearce to the bank, which has never been repaid the defendant. The suit brought by McKay was with the knowledge and consent of plaintiff. In fact the record discloses that it was upon the testimony of the latter the judgment against Parkhurst, Hooker & Parker was obtained. Although the evidence is conflicting, it strongly tends to establish that the \$420 paid the bank by the defendant was with the plaintiff's consent, and that it was the understanding of both parties that McKay was to be reimbursed for the amount thereof out of the money which should be collected by him from the South Omaha parties. The net sum received by defendant on the judgment is not sufficient for that purpose. After a careful review of the evidence we are persuaded that, while it is very conflicting, it is ample to support the findings. Judgment is

AFFIRMED.

J. F. MATHEWS V. THOMAS O'SHEA ET AL.

FILED JUNE 18, 1895. No. 6235.

1. **Principal and Agent: PAYMENT: CONVERSION.** Where, in the absence of fraud, money has been voluntarily paid an agent for the use of his principal, in pursuance of a valid authority, the agent is not liable to an action in conversion at the suit of the party paying the money, although the money has never been paid over to the principal.
2. ———: ———: ———. Whether an agent who receives money for his principal is liable as principal to the person paying it, so long as the agent stands in his original situation, and until there has been a change of circumstances by his having paid over the money to his principal or done something equivalent to it, is not decided.
3. **Allegations and Proof.** The allegations of the petition and the proof must agree.

ERROR from the district court of Madison county.
Tried below before JACKSON, J.

The facts are stated in the opinion.

Robertson, Wigton & Whitham, for plaintiff in error:

An agent who receives money for his principal is liable as principal, so long as he stands in his original situation, and until there has been a change of circumstances by his having paid over the money to his principal, or done something equivalent to it. (Story, Agency [8th ed.], sec. 300; *Hearsey v. Pruyn*, 7 Johns. [N. Y.], 179; *Herrick v. Gallagher*, 60 Barb. [N. Y.], 566; *Elliott v. Swartwout*, 10 Pet. [U. S.], 137; *Bend v. Hoyt*, 13 Pet. [U. S.], 263; *La Farge v. Kneeland*, 7 Cow. [N. Y.], 456; *Cox v. Prentice*, 3 Maule & S. [Eng.], 344.)

Robinson & Reed, contra, cited: *Lyon v. Tevis*, 8 Ia., 79; 1 Am & Eng. Ency. Law, 401; *Calvin v. Holbrook*, 2 N. Y., 126.

NORVAL, C. J.

This is an action by J. F. Mathews for the conversion of \$100, lawful money of the United States. The petition contains the usual averments. The answer is a general denial. At the close of the plaintiff's testimony the jury, under the direction of the court, returned a verdict for the defendants, and from a judgment in their favor plaintiff prosecutes error.

On the 29th day of January, 1892, one W. L. Ramey, through the defendants as his agents, entered into a written contract with the plaintiff to convey to him certain real estate situate in the city of Madison, this state, for and in consideration of the sum of \$3,000. By the terms of the agreement the plaintiff was to and did pay to the defendants upon the contract at the time of its execution, for the use of Ramey, the sum of \$100. The remaining \$2,900 was to be paid to plaintiff on March 1, 1892, or upon the execution and delivery to him of a warranty deed for the premises and an abstract showing title perfect and clear of all incumbrances of whatever nature. On the 1st day of March, 1892, the plaintiff tendered to the defendants the unpaid purchase price and demanded the deed. They declined to receive the money, and failed to furnish the deed for the property at the time stipulated, and thereupon plaintiff demanded of the defendants the \$100 previously paid, they having never paid the same to Ramey, their principal, nor has he ever requested payment to him. The defendants refused to pay the money to the plaintiff. About the 15th of March the defendants tendered to the plaintiff a deed to the property without an abstract of title, which was not accepted, the property being incumbered. In the month of July following Ramey, through the defendants as his agents, requested the plaintiff to make a quitclaim deed to the premises to him, for the reason the written contract had been placed on record. This request was complied with by the plaintiff.

The sole question for determination is whether under the foregoing facts this action can be maintained. It is undisputed that the defendants were acting as agents merely for Mr. Ramey, and were known as such to the plaintiff. A payment to them was in law a payment to their principal. Had they paid over the \$100 to Mr. Ramey, possibly the plaintiff could have maintained an action against the latter for a breach of the contract, or upon the implied promise to refund the money in case he failed to execute the deed as agreed; but it is clear that a suit for conversion would not lie against him, even though he had received the money from his agents. Neither can an action in the present form be maintained against the defendants, who were acting for their principal, since the plaintiff has neither such a possession or title to the money as would enable him to do so. Upon the payment of the \$100 to the defendants, the plaintiff's title to it was divested, and it passed at once to Mr. Ramey, the principal. The agents did not obtain possession of the money wrongfully or fraudulently, but lawfully, and were holding it alone for the principal. There has been no conversion. True, the money has never been paid over to Mr. Ramey, and it is argued that where an agent receives money for his principal he is liable as principal to the person so paying it, if the money has not been paid over to the principal and there has been no change in the agent's original situation. Whether this contention is well founded or not we will not now stop to consider or decide. It may be observed that the authorities bearing upon the question are conflicting. The following hold that the agent is not personally liable to the person paying the money: *Smith v. Bond*, 25 W. Va., 387; *Costigan v. Newland*, 12 Barb. [N. Y.], 456; *Colvin v. Holbrook*, 2 N. Y., 126; *Lyon v. Tevis*, 8 Ia., 79; *Denny v. Manhattan Co.*, 5 Den. [N. Y.], 639. The opposite rule is sustained by *Hearsey v. Pruyn*, 7 Johns. [N. Y.], 179; *Stone v. Wood*, 7 Cow. [N. Y.], 453; *Cox v. Prentice*, 3 Maule & S.

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[Eng.], 344; *Ripley v. Gelston*, 9 Johns. [N. Y.], 201. Conceding that money paid an agent for his principal may be recovered from such agent, the proper action, where there has been no fraud in the transaction, is for money had and received. (*Ashley v. Jennings*, 48 Mo. App., 142.) In the case under consideration no fraud is imputed to the defendants, but the money was honestly and fairly received by them as agents for their principal. The suit is in conversion and the evidence does not sustain the averments of the petition. The rule is that the allegations of the petition and the proof must agree. (*Young v. Filley*, 19 Neb., 543; *Chicago, B. & Q. R. Co. v. Grablin*, 38 Neb., 96; *Dillon v. Starin*, 44 Neb., 881.) It follows that the court did not err in directing a verdict for the defendants. The judgment is

AFFIRMED.

FARMERS & MERCHANTS INSURANCE COMPANY V.
THOMAS J. MALONE ET AL.

FILED JUNE 18, 1895. NO. 5782.

1. **Conflicting Evidence: REVIEW.** A verdict will not be set aside by a reviewing court as being against the evidence where upon a material issue in the case the evidence is conflicting.
2. **Trial: ADMISSION OF TESTIMONY.** Error cannot be predicated upon the exclusion of a certain line of testimony, where the same is subsequently received.
3. **Partnership: CONTRACTS.** Where one partner, during the existence of the partnership, entered into a contract with another within the scope of the partnership business, the firm will be bound thereby.

ERROR from the district court of Madison county.
Tried below before ALLEN, J.

Campbell & Wallis, for plaintiff in error.

Robinson & Reed, *contra*.

NORVAL, C. J.

This action was brought by Thomas J. Malone and Milton Campbell under their firm name of Malone & Campbell to recover the sum of \$343.55 claimed to be due them from plaintiff in error as commissions for services rendered in procuring applications of insurance. Upon a trial to a jury a verdict was returned in favor of the plaintiffs below in the sum of \$205.97. From a judgment entered upon the verdict the insurance company prosecutes error.

It is admitted that on the 10th day of November, 1891, the plaintiff in error entered into a written contract with the defendants in error appointing them agents to solicit for the company applications for fire insurance in Madison county, and by the terms of which contract the plaintiff in error agreed to pay Malone & Campbell, as commissions, the amount of twenty-five per cent of the net premiums on all approved applications taken by them on detached residences, farm property, churches, and school houses written at specified rates, and the sum of twenty per cent on all mercantile business written by them at board or schedule rates, and accepted by the company. There is practically no dispute in the evidence as to the amount of insurance procured by defendants in error, or as to the amount of commissions which they have been paid for their services. The insurance company insists, and it introduced evidence on the trial tending to establish, that shortly after the aforesaid written contract of agency was made and not more than two applications had been procured thereunder, it, through its special agent, C. K. Huntington, entered into a verbal agreement with Milton Campbell, one of the defendants in error, for and on behalf of the said firm of

Malone & Campbell, by the terms of which said Huntington was to assist them in procuring applications of insurance for the Farmers & Merchants Insurance Company; that the expenses of obtaining the risks were to be borne equally by the company and the defendants in error, and the commissions and fees to be divided in the same manner, and that in pursuance of said verbal contract said Huntington, for the space of eleven days, went with and assisted Malone & Campbell in the work of soliciting insurance, during which time they jointly procured the major part of the applications upon which commissions are claimed in this case. That Huntington assisted the defendants in error in their work is conceded by them; and further, if there existed an oral contract by which the commissions were to be divided, as claimed by the insurance company, the judgment must be reversed. Whether such a contract was ever made was a question of fact for the jury to determine. The plaintiffs below deny that they entered into any such agreement, and testimony was received upon the trial which tends to support their contention. In fact the evidence upon that issue was of so conflicting a nature that the jury would have been warranted in finding either way, and such being the case, it cannot be said that the verdict is without evidence to support it.

Another assignment is that the court erred in excluding from the jury the evidence of the witness Huntington relating to the usage or custom existing between insurance companies and local agents as to the division of commissions when a special agent assists in obtaining applications. The plaintiff in error offered to prove such usage by Huntington on his direct examination, but the court rejected it. Whether it was competent to admit such proof it is unnecessary to decide, for if there was any error in the rulings it was cured by the witness Huntington testifying, on cross-examination, that such a usage existed.

Error is alleged in that the court erred in refusing to

submit to the jury the first request of the plaintiff in error, which reads as follows: "Where two parties undertake to transact business together and there is no agreement as to how the profits and losses are to be divided, the law presumes that the parties intended to divide them equally." This instruction was not applicable to the issues made by the pleadings, since the insurance company in its answer relied upon an express oral contract for a division of the commissions. The rule stated in the request to charge could only apply in the absence of an express contract between the parties.

Objection is made to the refusal of the court below to give the third instruction requested by the plaintiff in error, which is in the following language: "Each member of a firm is an agent of that firm in the transaction of the firm's business, and any agreement made by a member of that firm will bind the firm in reference to the firm business." It is a familiar rule of law that one partner can bind the firm by any contract which he may make on behalf of the firm during the life of the partnership and within the scope of the firm business. This principle was enunciated in the instruction refused. The request was applicable to the case made by the pleadings and proof. The insurance company contended that a verbal contract for the division of commission was made by it with Mr. Campbell, one of the defendants in error, for and on behalf of his firm. The jury should have been informed to what extent the firm of Malone & Campbell was bound by the agreement entered into in its behalf by one of the partners. The principle stated in the request was not covered by any of the instructions given. For the error indicated the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

MARY A. SMALL ET AL. V. C. M. SANDALL.*

FILED JUNE 18, 1895. NO. 5887.

Review: JOINT ASSIGNMENTS OF ERROR: PRACTICE. A joint assignment of errors in a petition in error made by two or more persons which is not good as to all who joined therein will be overruled as to all. *Gordon v. Little*, 41 Neb., 250, followed.

ERROR from the district court of York county. Tried below before WHEELER, J.

George W. Bemis, for plaintiffs in error.

Harlan & Harlan, *contra*.

NORVAL, C. J.

The defendant in error, C. M. Sandall, brought this action before a justice of the peace against Mary A. Small, one of the plaintiffs in error, to recover \$5 on an account alleged to have been assigned to plaintiff by one Froid. The bill of particulars was in the usual form, and defendant answered by a general denial. The plaintiff having recovered a judgment for the full amount of his claim, the defendant prosecuted an appeal to the district court, where judgment was again rendered against her and one J. M. Bell, the other plaintiff in error, who was the surety on the appeal undertaking, for the sum of \$5.19, and cost of the action. The cause is brought to this court to obtain a review of the judgment by petition in error, Small and Bell joining in the assignment of errors, there being ten in number. The first is based upon the decision of the court in striking out certain paragraphs of the answer. The next four assignments relate to the refusal of the court to give certain instructions requested by Mrs. Small. The sixth

*A rehearing has been allowed.

and seventh relate to the sufficiency of the evidence to support the verdict. Eighth, the verdict is contrary to law. Ninth, the court erred in overruling the motion for a new trial. Tenth, the court erred in rendering a joint judgment against Mrs. Small and J. M. Bell, her bondsman.

It is obvious that Mr. Bell cannot have reviewed any of the alleged errors covered by the first nine assignments, since he did not except to any of the rulings therein complained of, nor did he join in the motion for a new trial, nor did he except to the overruling of the same. It is equally clear that Mrs. Small is not in a position to complain because judgment was rendered against her surety on the appeal bond. He alone could question the authority of the court to render a judgment against him in this action. The errors pointed out in the petition in error do not affect Mrs. Small and Mr. Bell jointly, but severally; therefore, the several assignments not being well taken as to each, must be denied as to both. (*Gordon v. Little*, 41 Neb., 250.)

JUDGMENT AFFIRMED.

CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAIL-
ROAD COMPANY V. DAVID DEAVER.

FILED JUNE 18, 1895. No. 6044.

1. **Common Carriers: NEGLIGENCE IN SHIPMENT OF LIVE STOCK.**

Evidence examined, and *held* to sustain the allegation of negligence in furnishing for the shipment of live stock, cars which were dangerous and unfit for use on account of the broken condition thereof.

2. **New Trial: MISCONDUCT OF JURY.** The term "misconduct," as used in the provision for new trials in civil actions, does not necessarily imply an evil or corrupt motive on the part of the jury or prevailing party.

ERROR from the district court of Burt county. Tried below before FERGUSON, J.

N. M. Hubbard, Jr., for plaintiff in error.

H. Wade Gillis, contra.

Post, J.

This is a petition in error and presents for review a judgment of the district court for Burt county. The cause of action alleged was the negligence of the defendant therein in furnishing to the plaintiff for the shipment of cattle a certain car which was dangerous and unfit for use by reason of the broken and unsafe condition of one of the doors thereof, resulting in the breaking of a leg of one of plaintiff's steers. Further reference to the pleadings will not be required, since the errors alleged do not involve the issues thereby presented.

The first assignment of the petition in error is that the verdict is not sustained by sufficient evidence. The undisputed evidence is that the plaintiff, on the 27th day of June, 1891, ordered of the defendant, through its agent, at Tekamah, two cars for the shipment of cattle from the station named to South Omaha, on the 29th day of the same month. On loading his cattle the day last named the plaintiff discovered that the cross-bar of one of the doors was cracked and the iron fastenings at the bottom thereof were broken so that said door could not be securely closed, but would swing outward at the bottom. The attention of the agent was directed to the condition of the car, but no effort was made to repair it. On the arrival of the car at South Omaha it was discovered that one of the steers shipped therein had broken his leg. The question was on this evidence submitted to the jury, whether such injury was the natural and proximate result of the alleged negligence of the defendant. The circumstances of the case, including

the character of the injury and the condition of the door of the car, tend strongly to sustain the contention of the plaintiff, and the finding in his favor should not be disturbed on the ground that it is unsupported by the evidence.

Another assignment is that the court erred in refusing to set aside the verdict on account of misconduct of the plaintiff's counsel. The facts necessary to an understanding of that contention are as follows: On September 30, 1892, Mr. Gillis, attorney for the plaintiff, addressed Mr. Hubbard, attorney for the railroad company, as follows:

"*N. M. Hubbard, Omaha, Nebraska*—DEAR SIR:—I wish you would consent to a continuance of *Deaver v. R. R. Co.* I have sickness in my family, and am trying to get out of trying any more cases this term. Will regard your consent as a great favor.

"Yours truly,

H. WADE GILLIS."

To the above Mr. Hubbard responded as follows:

"OMAHA, Sept. 30, 1892.

"*Hon. H. Wade Gillis, Tekamah*—MY DEAR JUDGE:—I have your favor of the 30th. Am very sorry to learn that you have sickness in your family. You are welcome to a continuance of *Deaver* case, and am only sorry that I cannot be of more assistance to you.

"Yours truly,

N. M. HUBBARD."

Some time subsequent to the date of the above correspondence Mr. Hubbard was informed by Mr. Gillis that the district court had refused to recognize the agreement for a continuance, and that the cause had been dismissed for want of prosecution. It was then mutually agreed, according to the affidavit of Mr. Hubbard, that the latter would go to Tekamah at a subsequent term of the court and consent to a reinstatement of the cause; that he had no knowledge of its having been reinstated, and, relying upon the statement of Mr. Gillis, believed it was not on the

docket, until the morning of the trial, when he received a message from the latter advising him that it would be for trial on that day; that he was then engaged in the trial of an important cause before the district court for Douglas county and was unable to attend and participate in the trial. Mr. Gillis, in an affidavit filed by the plaintiff, without controverting the foregoing statement, testified that he was willing to grant a reasonable continuance, and that if Mr. Hubbard had, in reply to the telegram referred to in his (Hubbard's) affidavit, "shown an intention to attend this court within a reasonable time, affiant would have consented to trial of same being put off to enable said Hubbard to get here, but the only reply affiant received to said telegram was a somewhat peremptory demand for a week's delay." This is not an attempt to enforce an agreement between counsel made out of court for their own convenience. The irregularity charged is the pressing of the cause for trial in the absence of the representative of the adverse party, who had not previous to that time been advised of the vacation of the order of dismissal. The circumstances attending the reinstatement of the cause are not shown by the record, but Mr. Hubbard, as we have seen, testified, without contradiction, that he was not advised of that order, and was not aware that the cause was on the docket until the receipt of the message from Mr. Gillis a few hours previous to the trial. The question is not whether the cause should have been continued for a week or a shorter period, but whether the action of counsel in forcing it to trial on that day, in the absence of the attorney for the defendant, was misconduct within the meaning of the statute. It should, in justice to Mr. Gillis, be remarked that no evil motive is imputed to him, and it is probable that there were considerations for the ruling complained of which are not shown by the record; but the facts disclosed amount to misconduct in its legal sense, without regard to the question of motive. Much has been

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said and written in harmony with the above, and the law of the subject is too well established to require the citation of authorities in this connection. It follows that the motion for a new trial should have been sustained and that the judgment should accordingly be

REVERSED.

BEN B. WOOD V. MAX L. ROEDER.

FILED JUNE 18, 1895. No. 6867.

1. **Summons: SERVICE: PLACE OF RESIDENCE.** The words "residence," and "usual place of residence," as employed in statutes, are generally synonymous with the term "domicile," hence the residence essential to confer jurisdiction is a legal one equivalent to the domicile of the defendant.
2. ———: ———: ———. The domicile of a defendant is that place where he has his fixed and permanent home, and to which, when absent, he has the intention of returning.
3. ———: ———: ———. To effect a change of domicile there must not only be a change of residence, but an intention to permanently abandon the former home. The mere residing at a different place, although evidence of the required intention, does not *per se* constitute a change of domicile.
4. ———: ———: ———. On the 10th day of February, 1894, R., a resident of O., in this state, with his family, went to New York city, among other purposes to establish institutes for the cure of the morphine habit, leaving his furniture and household goods in charge of a servant in a rented house, for which he continued to pay rent monthly until June 1, following. In the spring of that year he sent to O. some of his own and his wife's winter clothing and caused their summer clothing to be forwarded to them. On May 7, of the same year, R. wrote his landlord requesting a lease of the house occupied by him for the ensuing year, and saying: "I am closing up an important deal that will take from two to three weeks. In that case Mrs. R. will spend a few weeks at the sea shore before returning home." The servant in charge of the house understood their absence to be temporary merely and was not advised of any in-

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tention on the part of R. to reside permanently in New York until the month of June, and was, on the 17th day of April, engaged in putting the house in order preparatory to the return of the family, when a copy of the summons herein was by the sheriff left with her in said house for R. *Held*, Not to establish a change of domicile by R., and that the service of summons was at his usual place of residence within the meaning of the Code of Civil Procedure.

5. ———: ———. *Haynes v. Aultman*, 36 Neb., 257, distinguished.

OBJECTION by defendant in error to jurisdiction of supreme court on the ground that there was no legal service of summons in error. *Objection overruled.*

Winfield S. Strawn, for defendant in error.

George E. Pritchett, *contra*.

POST, J.

This is an objection by the defendant in error Roeder to the jurisdiction of this court on the ground that there was no legal service of the summons in error. It is conceded that a petition in error was filed herein within one year from the date of the judgment below, and that a summons was in due time issued for the defendant in error, directed to the sheriff of Douglas county, which was subsequently returned, showing service in due form by copy left at the usual place of residence of the defendant in error in said county. It is claimed in support of the objection that Roeder was not, at the date of such service, to-wit, April 17, 1894, a resident of Douglas county, but that he had, on the 10th day of February previous thereto, removed with his family from the city of Omaha to the state of New York, where he had a permanent residence at the date first mentioned. Numerous affidavits have been submitted in support of the objection, among others one by Roeder himself, which, so far as material to the question at issue, is as follows: "Max L. Roeder, being

duly sworn, deposes and says that he is the identical person above named, defendant in error in the above entitled cause; that on February 10, 1894, affiant removed with his family from the city of Omaha, Nebraska, to the city of New York, in the state of New York; that since said date affiant has been continuously a citizen of the state of New York; that since said February 10, 1894, this affiant has not been a resident of the city of Omaha, or state of Nebraska, nor had any home or place of residence in the said city of Omaha, or in the county of Douglas, in the state of Nebraska, nor has affiant or his family, or any of them, since said date ever been in said county of Douglas, or further west than the state of New York." The other affidavits are to the same effect and in substantially the same language as the above.

From evidence submitted by the plaintiff in error it appears that immediately prior to the departure of Roeder and wife from Omaha, they were occupying a rented house, in which they had resided continuously since the month of December, 1893, and their furniture and household goods, except a portion of their clothing and some silverware, were left in said house in charge of a servant, who remained on the premises most of the time, the balance of her time being spent with Mrs. Roeder's mother, Mrs. Goldsmith, under the direction of the Roeders. In the spring following their departure they shipped to Omaha some of their winter clothing, which they caused to be packed in said house, and by their order some summer clothing was forwarded to them at New York. At the time of the alleged service of the summons the servant mentioned was, in consequence of information received through Mrs. Goldsmith, engaged in cleaning and putting the house in order preparatory to the return of the Roeders. On the 7th day of May following the date of the service this letter was written by Mr. Roeder to his landlord in Omaha:

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"PLAZA HOTEL, NEW YORK, MAY 7, 1894.

"*Geo. N. Hicks, Esq., New York Life Building, Omaha, Neb.*—DEAR SIR: I desire to be informed without delay if you will give me the lease on our house until next May. It is very important that I know this immediately so that I can make my arrangements, and either give up the house at once, or know that I will not have to return on a few days' notice and store my things, in case you sell the same. I am closing an important deal which may take from two to three weeks, in that case Mrs. Roeder would undoubtedly spend a few weeks at the sea shore before returning home. But if you will give us the lease or assurance that in case the house is sold, we will not be disturbed until next May, I will keep the same, as you know we think a great deal of that little corner. I do not know whether my man has paid the rent or not; if not, then please send bill and I will see that the same is forwarded. Please answer by return mail.

"Yours truly,

M. L. ROEDER."

About June 1, following, Mrs. Roeder addressed Mr. Hicks as follows:

"PLAZA HOTEL, NEW YORK, Monday.

"DEAR MR. HICKS: It will be a great disappointment to me if you refuse to give us a lease on our house. You know I have always taken a great interest in it, and now, after having had it papered so prettily, it would be really too bad to have someone else move in. Some of my friends have invited me to spend the summer with them in their cottages at Buzzard's Bay and other resorts, but if we cannot get a lease on the house Mr. Roeder says I will have to return to Omaha at once and have everything stored. Please let us hear from you saying that we may rest easy about keeping the house for another year.

"Yours sincerely,

MRS. ROEDER."

To Mr. Hicks, the party addressed in the foregoing communication, Roeder stated that he was going to New York

for the purpose, among other things, of establishing institutes for the cure of the morphine habit, or to sell an interest in a morphine cure owned by him. He also paid rent monthly for the house occupied by him, up to and including June, 1894, and the servant above mentioned understood the absence of the family to be temporary only, and was not aware of any purpose on their part to remain permanently in New York previous to the date last above named. The natural and necessary inference is, we think, from the facts stated, that it was Roeder's purpose on leaving to return to his home in Omaha, and that he had no intention of abandoning his residence there prior to the month of June, 1894, or more than six weeks subsequent to the date of the service assailed. Indeed, a critical examination of the proofs submitted by him, including his own affidavit, fails to disclose any of the usual and cogent evidences of a change of domicile.

The terms "residence" and "domicile," as used in statutes, are generally convertible terms; hence, the residence essential to confer jurisdiction is a legal one equivalent to the domicile of the defendant. It is said in a recent work of great merit that the fundamental idea of domicile is the home. (Jacobs, Domicile, 72. See, also, 5 Am. & Eng. Ency. of Law, 857, and authorities cited.) To effect a change of domicile there must not only be a change of residence, but an intention to permanently abandon the former home. The mere residing at a different place, although evidence of a change, is, however long continued, *per se* insufficient. (See Jacobs, Domicile, 125 *et seq.*; *Hodgson v. De Beauchesne*, 12 Moore P. C. Cas. [Eng.], 283; *Moorhouse v. Lord*, 10 H. L. [Eng.], 285; *Frost v. Brisbin*, 19 Wend. [N. Y.], 11; *Dupuy v. Wurtz*, 53 N. Y., 556; *City of Hartford v. Champion*, 58 Conn., 268; *Ayer v. Weeks*, 65 N. H., 248; *Cobb v. Rice*, 130 Mass., 231.) We are aware that a modification of that rule has been recognized in its application to questions of taxation, the right to vote,

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pauper settlement, and the like; but without doubt it applies in all its force to questions of jurisdiction as the basis for judicial proceedings. The provisions of our Code so far as they relate to the subject in hand are section 584, authorizing the service of a summons in error in the same manner "as in the commencement of an action," and section 69, providing for service of summons at the commencement of an action by delivering a copy thereof to the defendant personally, "or by leaving one at his usual place of residence, at any time before the return day." Reading these provisions in the light of common law principles we can perceive no ground upon which to doubt the sufficiency of the service on the defendant in error. This conclusion we confess may seem to conflict with some of the earlier decisions of this court, but a careful examination of those cases proves the conflict to be apparent rather than real. In *Blodgett v. Ulley*, 4 Neb., 25, it is said: "The words 'usual place of residence' mean the place of abode at the time of service." That was a case involving the statute of limitations, in which the operation of the statute was held not to have been interrupted, the defendant having a residence in this state where service could have been made. In *Haynes v. Aultman*, 36 Neb., 257, the question involved was the validity of a judgment of a justice of the peace based upon service by a copy left at the former residence of the defendant, after he had removed with his family from the county and abandoned his domicile therein. It was held, on the authority of *Blodgett v. Ulley*, that the service was unauthorized and the justice of the peace did not thereby acquire jurisdiction over the defendant. The defendant in error it seems relies with confidence upon the following expression of the opinion in that case: "If the debtor and all the members of his family are absent from the county and the time of their return is uncertain, or their absence will be protracted beyond the time of the trial, it is evident that a summons left at the former residence

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would not be sufficient to apprise the debtor of the action. For the purposes of that trial the summons would not be served at the residence of the debtor." The language quoted should, however, be understood as referring to the facts of that case, as otherwise it must be regarded as *obiter* merely. In *Forbes v. Thomas*, 22 Neb., 541, it was held on the facts that the plaintiff, who had removed to the territory of Dakota and remained there engaged in business for the period of four years, had abandoned his residence in this state, although his family resided here for a considerable portion of the time, there being evidence tending to prove an intention to acquire a domicile in that territory. It certainly cannot be said that this court is committed to the doctrine that the term "usual place of residence," as employed in the Civil Code, necessarily implies, in every case, the personal presence of the defendant or his family, or that the court will fail to acquire jurisdiction by reason of the continuous absence from their home of the defendant and family from the date of service until after the time of the trial. The views here expressed are in harmony with the rulings of the New York courts, from which it seems the defendant would in that state have no standing in any matter in which residence there is prescribed as a condition to the relief sought or essential to the jurisdiction of the court. (*Vide In re Dimock*, 32 N. Y. Supp., 927, and cases cited.) It follows that the objection should be

OVERRULED.

CHARLES R. LEE V. ELVENE SMART.

FILED JUNE 18, 1895. No. 6007.

Master and Servant: DANGEROUS MACHINERY: RISK. Where a servant, in obedience to the requirements of his master, incurs the risk of machinery or appliances which, although dangerous, are not of such character that they may not be safely used by the exercise of reasonable skill and caution, he does not as a matter of law assume the risk of injury from accident resulting from the master's negligence. (*Sioux City & P. R. Co. v. Finlayson*, 16 Neb., 578.)

ERROR from the district court of Douglas county. Tried before KEYSOR, J.

Tiffany & Vinsonhaler, for plaintiff in error.

I. J. Dunn and *John J. O'Connor*, contra.

POST, J.

This was an action in the district court for Douglas county, in which the plaintiff therein, defendant in error, recovered for personal injuries received through the alleged negligence of the defendant therein in providing him with a defective wagon and insufficient team for the hauling of lumber and in overloading said wagon. The evidence in the bill of exceptions establishes the following facts: On the 9th day of July, 1890, the plaintiff below, who will be hereafter referred to as the plaintiff, was employed by the defendant, a lumber merchant in the city of Omaha, as teamster, and acted in said capacity until the receiving of the injuries hereafter mentioned on the 11th day of the same month. The plaintiff, on the day last named, was ordered by the defendant to deliver a load of lumber in the city of Council Bluffs, Iowa, which is reached by a wagon bridge over the Missouri river. The wagon road

on the Council Bluffs side of the river is much below the level of the bridge, which is reached from that side by a long approach. On descending from the bridge along said approach on the morning in question the team driven by the plaintiff became unmanageable, owing to the pressure of the heavily loaded wagon, which was not supplied with a brake of any kind. Being unable to control said team, and being in fear of imminent danger from the crushing or capsizing of the wagon, he jumped therefrom, and in so doing received the injuries for which he claims in this action. The alleged negligence consists in the overloading of the said wagon and the failure to supply it with a brake or appliance of like character.

The argument in this court is directed mainly to one proposition, viz., that the plaintiff was fully advised of the condition of the wagon and the character of the load which had been entrusted to his care, and that he accordingly assumed the risk of the employment in which he was engaged at the time of the injury. It has been many times asserted, and may be accepted as a general rule, that a servant who knows, or by the exercise of reasonable diligence could know, of any defect or imperfection in the things about which he is employed, and continues in the service without objection and without promise of change, is presumed to have assumed all the consequences resulting from such defects, and to have waived the right to recover for injuries caused thereby. A modification of that rule was, however, recognized by this court in *Sioux City & P. R. Co. v. Finlayson*, 16 Neb., 578, viz., that where the servant, in obedience to the requirements of his master, incurs the risk of machinery or appliances which, although dangerous, are not of such a character as to threaten immediate injury, or where it is reasonably probable that they may be safely used by extraordinary caution and skill, the master will be liable for a resulting accident. We are aware that the doctrine of the foregoing exception has

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been criticised (see sec. 17, notes to *Holmes v. Clarke*, 2 Thompson, Negligence, 953), although it is supported by many well considered cases, and must, whatever view we may entertain of it as an original proposition, be accepted as the law of this state. The following, in addition to those referred to in *Sioux City & P. R. Co. v. Finlayson*, may be cited as authority for the doctrine there asserted: *Conroy v. Vulcan Iron Works*, 62 Mo., 39; *Thorpe v. Missouri P. R. Co.*, 89 Mo., 650; *Kearney Electric Co. v. Laughlin*, 45 Neb., 390. That the case at bar is within the exception there recognized is apparent from a brief reference to the evidence in the record. The plaintiff, according to his own testimony, discovered the day after he entered the defendant's service that there were no blocks in the brake bars of the wagon assigned to him, and asked the defendant if it was necessary to fix them, to which the latter replied that other men had used the wagon without being fixed, and that he, the plaintiff, could, because the streets were level. The plaintiff appears to have had little knowledge regarding the weight of the load in question, but according to the testimony of Mr. Fry, who assisted in putting the lumber onto the wagon, it consisted of 2,945 feet of green poplar, weighing upwards of 8,500 pounds, or more than twice the weight of a reasonable load under the circumstances. Said witness testified further that when the wagon was about three-fourths loaded he called the defendant's attention to the fact that there was danger of overloading it, to which the latter replied that he wanted to put on a heavy load, as he was obliged to pay toll on crossing the bridge. The plaintiff, who it is shown had never crossed the river by means of the bridge mentioned, experienced no difficulty until he had started down the grade at the east end of the bridge, when, as claimed, without fault on his part, he lost control over the team in the manner and with the result above stated. The trial court on this evidence correctly declined to advise the jury that the plaintiff as a mat-

ter of law assumed the risk of accident, although he knew, or might with reasonable diligence have known, that there was danger in thus using the wagon without a brake, heavily loaded as it was, and by proper instructions the question was submitted whether in attempting to cross said bridge the plaintiff exercised reasonable caution, or whether in so doing he was guilty of contributory negligence.

Exception is taken to the giving and refusing of certain instructions, but a reference to the record discloses the fact that they are, in the petition in error, included in assignments with other paragraphs which are undoubtedly correct and which are not assailed in the printed brief of counsel for the plaintiff in error. Such assignments must, under the oft-repeated rule of this court, be disregarded. The judgment of the district court will for reasons here stated be

AFFIRMED.

STATE OF NEBRASKA, EX REL. A. S. CHURCHILL, ATTORNEY GENERAL, V. JOHN T. HAY, INCUMBENT, AND LUTHER J. ABBOTT, CLAIMANT.

FILED JUNE 18, 1895. NO. 7767.

1. **Statutes: REPEAL BY IMPLICATION.** A subsequent statute treating of a subject in general terms, and not expressly contradicting the more positive provisions of a prior special act, will not be construed as a repeal by implication of the latter if any other reasonable construction can be adopted.
2. **State Officers: HOSPITAL FOR INSANE: REMOVAL OF SUPERINTENDENT.** The provision of section 7, article 7, chapter 83, Compiled Statutes, for the hearing by the board of public lands and buildings of charges against certain officers is cumulative only, and was not intended as a repeal of the prior provision for the removal, by the governor for cause, of the superintendent of the hospital for the insane at Lincoln. (Sec. 11, ch. 40, Compiled Statutes.)

3. **Public Officers: POWER OF GOVERNOR TO REMOVE.** The power conferred upon the governor to remove certain public officers for cause is an administrative and not a judicial function, and orders made in the exercise of that power are not reviewable by the courts.
4. ———: ———: **JURISDICTION OF COURT.** The limit of judicial interference in such cases is to protect public officers, removable for cause only, in their right to a hearing upon specific charges.
5. ———: **REMOVAL BY GOVERNOR: SUFFICIENCY OF FINDINGS.** Certain findings examined, and *held* to sustain the order based thereon removing the respondent from the office of superintendent of the hospital for the insane at Lincoln.

ORIGINAL action in the nature of *quo warranto*, on the relation of the attorney general, to determine which of the respondents is entitled to hold the office of superintendent of the hospital for the insane at Lincoln. *Judgment of ouster against incumbent.*

The facts are stated in the opinion.

A. S. Churchill, Attorney General, for the state.

M. B. Reese, C. Hollenbeck and J. W. C. Abbott, for respondent Luther J. Abbott:

The power exercised by the governor in hearing charges against respondent Hay and in removing him from office was administrative and not judicial. (*State v. Hawkins*, 44 O. St., 98; *State v. Oleson*, 15 Neb., 247; *Minkler v. State*, 14 Neb., 181; *State v. Supervisors of Saline County*, 18 Neb., 422; *State v. Sheldon*, 10 Neb., 453.)

The governor had the power to remove the incumbent for cause, and that power was not taken away by the power given the board of public lands and buildings to hear charges and report the evidence and their conclusion to the governor. (*State v. Smith*, 35 Neb., 13.)

Whenever a power is given by statute everything necessary to make it effectual or requisite to attain the end, is implied. (Sutherland, Statutory Construction, sec. 341.)

Repeal by implication is not favored. An act will not be held to repeal a former act unless the repugnancy between the two is plain and unavoidable. (*Lawson v. Gibson*, 18 Neb., 137; *State v. Babcock*, 21 Neb., 599; *Hopkins v. Scott*, 38 Neb., 661.)

It does not require a judicial process to declare an office vacant. (*Conner v. Mayor of New York*, 5 N. Y. 285.)

The governor has power under the statute to remove any appointive officer after a hearing of charges. (*Keenan v. Perry*, 24 Tex., 253; *Wilcox v. People*, 90 Ill., 186; *People v. Higgins*, 15 Ill., 110; *State v. Doherty*, 25 La. Ann., 119; *State v. Hawkins*, 44 O. St., 98; *City of Hoboken v. Gear*, 27 N. J. Law, 265; *People v. Whitlock*, 92 N. Y., 191; *State v. McGarry*, 21 Wis., 496; *Trimble v. People*, 34 Pac. Rep. [Col.], 981.)

Webster, Rose & Fisher dick, for respondent John T. Hay :

The governor has no original jurisdiction under the constitution or the statute to receive, entertain, or hear charges against any officer of the insane hospital or of any other of the state institutions placed under control of the board of public lands and buildings. (*Mechem, Public Officers*, secs. 103, 104, 110, 446-448, 455; *State v. Seavey*, 22 Neb., 454; *State v. Smith*, 35 Neb., 33; *Lease v. Freeborn*, 35 Pac. Rep. [Kan.], 817; *People v. Freese*, 76 Cal., 633; *Carr v. State*, 111 Ind., 101; *People v. Weber*, 86 Ill., 285; *Marbury v. Madison*, 1 Cranch [U. S.], 174.)

The governor's jurisdiction in respect to the hearing of charges—granting he has such—is concurrent with that of the board of public lands and buildings, and being judicial and not executive in character, may be challenged and his competency to give an impartial hearing inquired into. (*Stockwell v. Township Board of White Lake*, 22 Mich., 344; *Cooley Constitutional Limitations*, 413; *State v. Crane*, 36 N. J. Law, 399.)

The evidence considered by the governor,—*ex parte* affidavits, and records and reports not disclosed to defendant or opportunity given to him to examine, rebut, or explain,—was incompetent, and no conviction or judgment founded on proceedings in which such evidence was considered should be permitted to stand. (*State v. Bryce*, 7 O., 416; *Andrews v. King*, 77 Me., 233; *Dullam v. Willson*, 53 Mich., 414; *People v. Nichols*, 79 N. Y., 588; *Murdock v. Trustees of Phillips Academy*, 12 Pick. [Mass.], 244.)

Defendant was wrongly required before the governor to take the burden of proof, and presumed guilty till he should, to the governor's satisfaction, show he was not guilty. This is itself sufficient to render the conclusion arrived at a mere nullity. (*Dullam v. Willson*, 53 Mich., 413; *Larkin v. Noonan*, 19 Wis., 99; *Andrews v. King*, 77 Me., 233; *In re Eaves*, 30 Fed. Rep., 26.)

The nature of the governor's action being not in his executive or political capacity, but in a judicial one, and affecting a right, is subject to judicial review, not only as to his jurisdiction, but also as to the regularity of his procedure and the fairness and validity of the proceedings themselves to sustain a judgment of amotion. (*Marbury v. Madison*, 1 Cranch [U. S.], 163; *Page v. Hardin*, 8 B. Mon. [Ky.], 655; *Dullam v. Willson*, 53 Mich., 409; *Commonwealth v. Fowler*, 10 Mass., 302; *State v. Chase*, 5 O. St., 534; *In re Nichols*, 57 How. Pr. [N. Y.], 396.)

The charges themselves are insufficient to constitute malfeasance in office or other good and sufficient cause for removal, and are insufficient to require respondent to answer to; and the governor's findings are insufficient to justify or sustain a removal from office. (*State v. McGary*, 21 Wis., 498; *State v. Lazarus*, 39 La. Ann., 161; *Coite v. Lynes*, 33 Conn., 115; *In re Nichols*, 57 How. Pr. [N. Y.], 396; *Dullam v. Willson*, 53 Mich., 407.)

Post, J.

This is an original proceeding in the nature of a *quo warranto*, on the relation of the attorney general, under the provisions of section 714 of the Civil Code, for the purpose of determining which of the respondents is entitled to the office of superintendent of the hospital for the insane at Lincoln. The questions we are called upon to decide are all presented by the pleadings of the respondents, hence further reference to the information will not be required in this opinion. It appears from the pleadings that the respondent Hay, hereafter referred to as Dr. Hay, was by Hon. Lorenzo Crounse, governor, appointed to the office in dispute, his appointment taking effect April 1, 1893. The authority for such appointment is found in section 10, chapter 40, Compiled Statutes, as follows: "The governor of the state shall appoint a superintendent and may appoint two assistant physicians for the hospital of the insane, one of whom shall be a woman, who shall hold their offices for a term of six years, unless sooner removed as hereafter provided." It is by section 11 of said chapter further provided: "The superintendent of said institution shall be a physician of acknowledged skill and ability in his profession, and be a graduate of a regular medical college. He shall be the chief executive officer of the hospital, and shall hold his office for the term of six years, unless sooner removed by the governor for malfeasance in office, or other good and sufficient cause." On the 20th day of April, 1895, Hon. Silas A. Holcomb, governor, caused to be served upon the respondent above named the following notice:

"LINCOLN, NEB., April 20, 1895.

"To J. T. Hay, M. D., *Hospital for the Insane, Lincoln, Neb.*—SIR: I beg to hereby notify you that information and complaints in the nature of charges have been presented to me affecting your management of the hospital for the insane at Lincoln, Nebraska, over which you have

heretofore had control as superintendent, specified as follows:

"1. That the management of said hospital while under your control has been extravagant, costing the taxpayers of the state a much greater sum of money than like institutions similarly situated in adjoining states.

"2. That as superintendent of said hospital you have grossly neglected your duty in permitting and allowing your subordinates and employes to wantonly and cruelly assault, abuse, and maltreat the patients in said hospital for treatment.

"3. That you have been negligent in your duties, in absentsing yourself from said hospital while the assistant physician therein was also absent.

"4. That you have been guilty of misconduct in office by attempting to influence your employes and subordinates from giving testimony in the courts of justice and by attempting to induce them to withhold facts and thereby defeat the ends of justice when criminal proceedings were being tried in the courts involving certain persons in defrauding the state out of large sums of money.

"5. That you have not properly, or in a suitable manner, treated the patients entrusted to your care for mental diseases with which they have been afflicted, but on the contrary you have grossly neglected to treat such patients and have thereby greatly impaired the usefulness of said hospital as a place for the treatment of the insane.

"6. That under your administration of said hospital patients therein have been frequently assaulted and abused in an unnecessary manner and thereby bringing scandal and disgrace upon said institution.

"7. That the management of said hospital by you as superintendent has been wasteful and extravagant, incompetent and inefficient.

"You are required to appear at my office April 30, A. D. 1895, at 2 P. M., and to show cause, if any you have,

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why you should not be removed from the said office of superintendent for said institution.

"SILAS A. HOLCOMB,

"Governor."

On appearing before the governor in response to the foregoing citation Dr. Hay interposed certain objections to the proceeding, which will be hereafter noticed, and which having been overruled, a hearing was had, resulting in the following finding and order :

"STATE OF NEBRASKA,

"EXECUTIVE OFFICE, LINCOLN, May 18, 1895.

"*J. T. Hay, Hospital for the Insane, Lincoln, Neb.*—SIR:

I beg hereby to inform you of the conclusions reached by me in the matter of the investigation of the management of the Nebraska hospital for the insane at Lincoln during the period of your incumbency as superintendent.

"1. From the investigation made by me I find that during the management of the hospital for the insane by you the expenses of maintaining the patients have been greater than necessary, and that there has not been that degree of economy exercised which the taxpayers of the state have the right to expect from those employed in the public service.

"2. Also, that the attendants employed by you and under your control have wantonly and unnecessarily abused and maltreated patients in your charge, and that the patients have not been given that kindly care and treatment from those having them in charge which by reason of their unfortunate condition they should receive.

"3. Also, that the medical treatment of patients, especially in the violent ward known as the third ward, has not been modern nor in accordance with what experience has demonstrated to be best for patients in hospitals for the insane, in this: The administration of sedatives and narcotic drugs by yourself, your assistants and attendants, had a harmful effect upon the patients committed to your care. The administration of such drugs in the quantities given

at the Nebraska hospital for the insane at Lincoln, Nebraska, under your superintendency, are not warranted by the experiences of other institutions of the same character, in this: The clinical records of the hospital over which you have had the supervision disclose that you have relied upon sedatives, narcotics, hypnotic drugs to accomplish results which could better be obtained by the use of other and less dangerous methods; especially do the records of your institution show the extensive employment by you and under your direction of the hypnotic paraldehyde, a drug dangerous to life when administered frequently and in large doses; and also, you have carelessly and negligently permitted attendants at the hospital to administer such narcotic, hypnotic, and sedative drugs to patients under your charge at frequent intervals, and in large doses, at the discretion of the attendants, without the express prescription or direction of one of the physicians in charge of said hospital, and without specific directions so to do. That there has not been exercised that degree of care, caution, and skill in the management of the hospital which should obtain in such an institution and which is necessary to secure in order that the hospital may be conducted economically and the patients receive the care and attention necessary for their bodily comfort and proper professional treatment looking toward their recovery.

"For the causes above mentioned it is hereby ordered that you be and are hereby removed as superintendent of said hospital, and you are hereby relieved of any further authority or duty as such superintendent.

"SILAS A. HOLCOMB,

"Governor."

On the day last named Luther J. Abbott, hereafter referred to as Dr. Abbott, was by the governor appointed superintendent of the hospital, *vice* Dr. Hay, removed, and has qualified himself therefor by giving bond and taking the requisite oath of office. Both respondents are eligible

to the office, and the questions argued all relate to one inquiry, viz., the legality of the order of the governor removing Dr. Hay.

The first proposition to which we will give attention is that exclusive jurisdiction has by statute been conferred upon the board of public lands and buildings to take cognizance of and hear charges against officers of the class including the superintendent of the hospital for the insane. The basis of that contention is section 7, article 7, chapter 83, Compiled Statutes, which reads as follows: "It shall be the duty of the board to take cognizance of all charges or complaints made against the said public officers, and at a regular meeting to give an impartial hearing to such charges and the defense against them, if any, and report the charges, evidence, and their conclusions in the matter to the governor within six days after the determination of such investigation." This act was approved February 13, 1877, while the act for the government of the hospital for the insane was approved March 13, 1873. In *Jackson v. Washington County*, 34 Neb., 680, it was said that a subsequent statute treating of a subject in general terms, and not expressly contradicting the more positive provisions of a prior special act, will not be construed as a repeal by implication of the latter if any other reasonable construction can be adopted. The later act must, in the light of that rule, be construed as cumulative and embracing charges and complaints of parties aggrieved by the alleged misconduct of the officers therein contemplated. It was, in brief, designed for the benefit of the public at large, to afford a summary remedy in certain cases for misconduct in office, and not as a limitation upon the executive prerogative conferred by the act of 1873.

The question to which most prominence is given in the argument was suggested in *State v. Smith*, 35 Neb., 13, viz., whether the power of removal for cause of an officer holding for a fixed and definite term is judicial in the sense that

such officer is entitled to have the question of cause determined by the courts in the first instance or by appropriate appellate proceeding. The conclusion reached, although not expressed in the case cited, was that such power is in its proper sense an administrative rather than a judicial function, and that orders made in the exercise thereof are not reviewable by the courts; and a re-examination of the subject at this time has confirmed that conclusion. A review of the cases cited in support of the conflicting views upon this question is deemed unnecessary in this connection. It is sufficient that the conclusion above stated is in accord with the decided weight of authority and supported by the more satisfactory reasoning. (See *State v. McGarry*, 21 Wis., 496; *State v. Prince*, 45 Wis., 610; *Keenan v. Perry*, 24 Tex., 253; *State v. Doherty*, 25 La. Ann., 119; *Taft v. Adams*, 3 Gray [Mass.], 126; *Ex parte Wiley*, 59 Ala., 226; *Thompson v. Holt*, 52 Ala., 491; *State v. Hawkins*, 44 O. St., 98; *Donahue v. Will County*, 100 Ill., 94.) But the question cannot be regarded as an open one in this state. In *State v. Oleson*, 15 Neb., 247, it was held that the power of the county board to remove a sheriff for corruption in office, under the provisions of article 2, chapter 18, Compiled Statutes, is quasi-political and administrative in its nature, and not prohibited by the constitution. The doctrine of that case was expressly recognized and affirmed in *State v. Saline County*, 18 Neb., 422. We can perceive no difference in principle between those cases and that before us, since the question involved therein was the nature of the power conferred and not the person to whom it is entrusted. Speaking of the cases which assert the opposing view it may be said that, as a rule, they rest upon the assumption that the incumbent has a property right in the office he holds. Such, although the doctrine of the common law has no foundation whatever in a representative government where the right to hold office is a mere privilege.

(*Conner v. Mayor of New York*, 5 N. Y., 285; *State v. Hawkins*, *supra*.) The limit of judicial interference in all such cases is that indicated in *State v. Smith*, *supra*, viz., to protect the officer in his right to a hearing on specific charges; or, in other words, to require the officer or body claiming the right of removal to keep within his or its jurisdiction.

An allegation of the answer of Dr. Hay which should be noticed in this connection is that Governor Holcomb was incapable, on account of bias and prejudice, of giving said respondent an impartial hearing. What has already been said is a sufficient answer to that contention. But there are other considerations which lead to the same result, the first of which is that there is in the record no apparent foundation for the charge, and second, the motives of the chief executive officer of the state in the discharge of his duty as such are not the subject of inquiry in this proceeding. Criticism, in our opinions, upon the official conduct of the head of a co-ordinate department of the state government would be as indecorous and unjudicial as reflections upon this court in a state paper by the governor would be undignified and unstatesmanlike.

It is urged by Dr. Hay that "the charges themselves are insufficient to constitute malfeasance in office, or 'other good and sufficient cause for removal,' and are insufficient to require the respondent to answer, and the governor's findings are insufficient to justify or sustain a removal from office." We quite agree with counsel that the governor is not by the terms of the act here involved invested with arbitrary powers. The language "other good and sufficient cause" should be held to mean causes of like nature and affecting the competency or fitness of the respondent for the position he holds, or, in the words of Judge Dixon, construing a similar statute in *State v. McGarry*, *supra*, "the cause must be one which touches the qualifications of the officer for the office, and shows that he is not a fit or proper person to perform the duties."

We shall not examine *seriatim* the findings of the governor. The statement therein that the expenses of maintaining the hospital for the insane have been greater than necessary, and that the degree of economy in its management has not been such as the taxpayers have a right to expect, is in the nature of a conclusion, and probably too indefinite to sustain an order of removal, since it does not appear therefrom that Dr. Hay is directly responsible for such extravagance. Expenditures for the maintenance of our state institutions are largely controlled by the board of purchase and supplies, composed of the governor, commissioner of public lands and buildings, and secretary of state, and for whose mismanagement the superintendent of the hospital for the insane is in nowise responsible. But the second and third findings relate to matters within the jurisdiction of the respondent, and directly involve his management of the hospital. They are certainly responsive to the issues presented by the charges, and sufficient in law to sustain the order based thereon. We shall not argue to prove that the wanton abuse of patients committed to such institutions is cause for removal under the law of this case; and it is wholly immaterial whether such abuse be in the way of physical restraint of patients, or in permitting the giving by irresponsible attendants at their pleasure, without prescription or direction of the physicians in charge, of dangerous doses of narcotic or other drugs.

It follows that the order removing Dr. Hay is in all respects regular and binding, and that he has, since the date thereof, held the office in controversy without authority of law. It follows, too, that the appointment of Dr. Abbott invested the latter with a right to possession and the emoluments of said office, and that he is entitled to judgment on the pleadings. The proper writ will accordingly be allowed for the purpose of putting him in possession. Judgment of ouster against the respondent Hay in favor of the respondent Abbott.

JUDGMENT OF OUSTER.

CHARLES T. PATTEN, APPELLANT, V. CHARLES H.
LANE ET AL., APPELLEES.

FILED JUNE 18, 1895. No. 6301.

1. **Practice: ACTIONS IN REM: NOTICE OF CROSS-BILL.** Where, under our practice, the defendants to an action *in rem* are required to disclose their interests in the subject of the controversy, notice of a cross-bill is to be regarded as a proceeding in the cause designed to assist in the prosecution thereof, and accordingly interlocutory in character.
2. **Jurisdiction: VALIDITY OF DECREE.** In such case a decree based upon a cross-bill filed by a single defendant after answer day, his co-defendants having made no appearance, is irregular merely, and not void for want of jurisdiction.
3. **Notice of Cross-Bill.** *Arnold v. Badger Lumber Co.*, 36 Neb., 841, distinguished.

APPEAL from the district court of Douglas county.
Heard below before IRVINE, J.

McClanahan & Halligan, for appellant, cited: *Carlow v. Aultman*, 28 Neb., 672; *Cockle Mfg. Co. v. Clark*, 23 Neb., 702; *Arnold v. Badger Lumber Co.*, 36 Neb., 841.

Wharton & Baird, contra.

POST, J.

This is an appeal from a decree of the district court for Douglas county dismissing the petition of the plaintiff by which he seeks to set aside a deed executed by him to the defendant Lane for lot 10, in block 34, in Kountze Place, in the city of Omaha; also to set aside a deed for the same property from John F. Boyd, master commissioner, to Henry F. Cady, and a deed from said Cady to Lane, also for leave to redeem said property. The material facts are as follows: On the 5th day of July, 1888, Andrew J.

Eaton, a single man, and Isabella K. Eaton, being the owners of the property above described, mortgaged the same to one Smith to secure their notes of even date therewith for \$4,500. On the 9th day of the same month they executed a second mortgage on said premises to one Bates for \$250, and on the same day they executed a third mortgage to Fred W. Gray for \$1,719.44. On the 4th day of February, 1889, the Eatons conveyed the west half of said premises to William F. Chittick. On the 9th day of May, 1890, said Eatons conveyed the east half of said premises to Ursella O. Bartlett, to whom on the day following said Chittick conveyed the west half thereof, and who, on the 13th day of March, 1891, conveyed said lot to the plaintiff. On the 4th day of March, 1889, Lewis Bradford commenced an action in the district court of Douglas county for the foreclosure of a mechanic's lien against said premises, to which the several mortgagees, as well as the holders of the title, Chittick and the Eatons, were made defendants. Summons was served on the several defendants March 6, the answer day named therein being April 8, following. On the day last named Fred W. Gray filed a demurrer to the petition, and on May 11 had leave to withdraw his demurrer and file answer and cross-bill, in which he prayed for the foreclosure of his mortgage. April 14, 1890, the petition of Bradford, the plaintiff, was dismissed at his cost. April 15 the default of Chittick and the Eatons was entered, and on the same day the cause proceeded to decree on Gray's cross-bill, and in accordance with the prayer thereof. Under this decree the property was sold by Boyd, special master, to Cady, who subsequently conveyed to the defendant Lane, and two days thereafter the plaintiff conveyed his interest in said property to said defendant.

There are two facts appearing from the foregoing statement to which especial prominence is given in the brief of counsel, viz.: (1) That Mrs. Bartlett, through whom the

plaintiff claims, acquired title from Chittick and the Eatons during the pendency of the foreclosure proceeding and after the entry of the decree therein; and (2) that her said grantors, who held the legal title at the time of the filing of the cross-bill, were not served with summons or other formal notice thereof. It is clear, both upon reason and authority, that if the court had acquired jurisdiction of the defendants named for the purpose of the cross-bill, not only they, but their grantees as well, are estopped by the decree subsequently rendered. Another proposition firmly established by the decisions of this court is that where a defendant, after answer day, files a pleading in the nature of a cross-petition for relief against a co-defendant, the latter is entitled to notice thereof. (See *Hapgood v. Ellis*, 11 Neb., 131; *Cockle Mfg. Co. v. Clark*, 23 Neb., 702; *Carlou v. Aultman*, 28 Neb., 672; *Arnold v. Badger Lumber Co.*, 36 Neb., 841; *Havemeyer v. Paul*, 45 Neb., 373.) The question was in each of the above cases presented by direct attack upon the decree. But in this case counsel assert that such notice is in its nature a jurisdictional process, without which the decree is not voidable merely, but absolutely void. Preliminary to a consideration of that question it should be observed that the district court in the decree appealed from in express terms found that the defendants in the former suit were legally notified of the filing of the cross-bill upon which the decree of foreclosure rests. The basis of that finding is the entry of notice in the motion docket conformably to the rules of the district court for Douglas county, which, so far as they relate to the subject in hand, are as follows:

"15. All motions relating to actions, except such as are made at or during the progress of a trial or hearing, or not incident to or relate to the time of trial, or are grantable of course without notice, must be in writing, and filed, unless the court shall see fit to dispense therewith, when the motion is made in open court, in the presence of counsel for

the adverse party; and notice for the hearing of all such motions must be given as required by statute or these rules.

"16. A motion docket will be furnished for the use of the bar, and the filing of a motion, and the entry in such docket of notice of the motion, or the hearing of a demurrer, and entering the title of the cause in which it is filed, with date of entry, together with a brief statement of the object of the motion and the names of the attorneys of record in the cause for twenty-four hours before the morning of motion day, shall be notice thereof to the opposite party in all cases where a different notice is not required by statute."

It is argued that inasmuch as no provision has been made for the issuing and service of a formal summons upon the filing by a defendant of a pleading in the nature of a cross-bill, the character of the notice required and the time for pleading thereto is a subject within the jurisdiction of the court, and for an error of judgment in that regard the remedy is by motion to set aside the decree or other direct proceeding. It is further argued that it is within the power of the district court by rule to provide for notice in such cases; that under the rules above quoted, the entry in the motion docket was notice to each of the defendants of the cross-bill in question, and that the failure to give other or different notice presents a mere irregularity in nowise affecting the jurisdiction of the court. But the weakness of that argument is that it assumes the very proposition in dispute, viz., the jurisdiction over the parties adverse to Gray in the former suit for the purpose of any order, since it is only those parties who are brought within the jurisdiction of the district court by its process or otherwise who are required to take notice of its rules. Recurring to the question first suggested, it may be said that if the court by its summons in the former suit acquired jurisdiction of the defendant, for the purpose of the

several liens upon the mortgaged premises, it follows that notice of the cross-bill was not essential to a valid decree. This brings us to a consideration of the question on its merits.

A cross-bill is brought by a defendant in a suit against the plaintiff or defendant in the same suit, or against both touching the matters in question in the original bill (2 Daniell, Chancery Practice [4th ed.], 1548; Story, Equity Pleading, sec. 389; 1 Hoffman, Chancery Practice, 455), and is generally considered as a defense, or as a proceeding to procure a complete determination of a matter already in litigation. (2 Daniell, Chancery Practice [4th ed.], 1548.) The appearance of parties adverse to the complainant in a cross-bill was enforced by subpoena in the same manner as in case of an original bill. (1 Smith, Chancery Practice, 461*.) But a wide departure from that practice has been countenanced by the courts of this country, particularly in actions *in rem* where the defendants are by the original bill required to disclose their interests in the subject of the controversy. For instance, in *Pattison v. Vaughan*, 40 Ind., 253, it is said: "We think that as to matters contained in the original complaint, if not in all cases, the defendants to the original complaint, when served with process thereon, as well as the plaintiff therein, must be regarded as in court for all the purposes of the action, whether the matter in controversy arise upon the original complaint or upon the answer or cross-complaint." This language is quoted with approval by Judge Elliott in *Bevier v. Kahn*, 111 Ind., 200, in which it is held that notice is unnecessary when the original bill discloses the character of the claim of the cross-bill. And in *Gregory v. Pike*, 29 Fed. Rep., 588, it is said that a cross-bill, being auxiliary to the original bill, service thereof may be had on the attorney of record, and it is no objection that the party himself is out of the jurisdiction of the court. (See, also, Work, Jurisdiction, sec. 44.) The

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conclusion we reach from an examination of these authorities, with others, is that notice of a cross-bill, under our system, particularly in an action of foreclosure, is a proceeding in the cause, designed to assist in the prosecution thereof, and, accordingly, interlocutory rather than jurisdictional in character. Such, too, is the logical effect of our decisions holding that defendants are required to take notice of cross-bills filed before answer day. Those decisions rest upon the assumed jurisdiction of the court to determine the equities of the defendants, not alone against the plaintiff, but also as between themselves. The doctrine that the court having once acquired jurisdiction may decide every question arising in the prosecution of the cause is the settled law of this state, and we can perceive no ground upon which to doubt its application to the case before us. We are aware that it was in *Arnold v. Badger Lumber Co.*, *supra*, said, that a defendant who has made no appearance can be affected by a cross-bill filed after answer day only by service of notice "in the nature of a summons as to such pleading;" but the question there involved was, as we have seen, the regularity and not the validity of the decree. We find in the Code (sec. 574 *et seq.*) a general provision for notice of motions, which is required to be in writing and to state the names of the parties, to designate the court or judge to whom it will be addressed, and to be served in the manner prescribed for the service of summons. The office of the notice thus required is certainly "in the nature of a summons," since it is a process upon which the validity of the order depends. In that sense and no other did we use the expression above quoted in the case referred to.

The conclusion stated renders unnecessary an examination of the other questions presented by the record.

DECREE AFFIRMED.

IRVINE, C., not sitting.

CHARLES W. HAMILTON V. GEORGE GOFF.

FILED JUNE 18, 1895. No. 5851.

1. **Contracts: BREACH: WHEN CAUSE OF ACTION ACCRUES.** H. agreed to furnish to G. a designated herd of cattle on the 1st day of May, to be cared for and herded by the latter during the ensuing season at a stipulated rate per head. On May 13, H. having refused to furnish said cattle or any of them, an action for damage was brought by G. on the said contract. *Held*, That the action was not premature.
2. **Record for Review.** *Held*, That the question of the measure of damage is not presented by the record.

ERROR from the district court of Pierce county. Tried below before POWERS, J.

John R. Hays and Benjamin Lindsay, for plaintiff in error.

Douglas Cones, contra.

POST, J.

This action originated in the county court of Pierce county, from whence it was removed by appeal to the district court of said county, where a trial was had, resulting in a verdict and judgment for Goff, the plaintiff therein.

The essential allegations of the petition are as follows: On the 28th day of April, 1891, the defendant below, Hamilton, verbally agreed to furnish to the plaintiff a designated herd of cattle, estimated at 138 head, to be herded and cared for by the latter during the season of that year, or such part thereof as the defendant might elect, at the agreed rate of seventy-five cents per head for the season, or forty cents per head for all remaining in the herd not later than July 1; that, relying upon the said promise, the plaintiff was at great expense in preparing to properly herd and care for said cattle, but the defendant has wholly

Hamilton v. Goff.

failed to perform the obligation imposed upon him by said contract, and that he, on or about May 1, 1891, refused to deliver the cattle above mentioned or any others, to plaintiff's damage, etc. The answer is, first, a general denial; second, an allegation that if any contract was in fact made as alleged, no right of action had accrued thereon when this action was commenced.

An analysis of the evidence is unnecessary in this connection, since we observe no substantial conflict with respect to the agreement alleged, or the facts which in law constitute a breach thereof. The only inquiry is, therefore, whether the action is premature, as alleged by the plaintiff in error. The date of the commencement of the action in the county court is not disclosed by the record, the evidence upon that point being confined to the petition in the district court, which was filed July 9, 1891. But assuming the date named by counsel for plaintiff in error, May 13, to be correct, it does not follow that the action was prematurely brought. The defendant, by his agreement, was required to deliver the cattle on May 1, and a refusal on that day amounted to a breach of the contract, for which the plaintiff was entitled to recover damages. But the argument in this court is directed to the measure of damage rather than the cause of action, a question not presented by this record. True, one of the assignments of the petition in error is the giving of paragraphs 6 and 7 of the instructions on the motion of the court, but a reference to the motion for a new trial fails to disclose any objection therein to said instructions. It has long been the rule of this court that exceptions to the giving or refusing of instructions will not be noticed unless such rulings are specifically assigned in the motion for a new trial. (*Cleveland Paper Co. v. Banks*, 15 Neb., 20; *Hastings & G. I. R. Co. v. Ingalls*, 15 Neb., 129; *Omaha & R. V. R. Co. v. Walker*, 17 Neb., 432.) There being no error of record, the judgment must be

AFFIRMED.

CHRISTOPHER BETZ, APPELLEE, v. ALBION P. MARTIN
ET AL., APPELLANTS, IMPLEADED WITH JESSE P.
CHIPMAN.

FILED JUNE 18, 1895. No. 5811.

Review: FAILURE TO FILE BRIEFS: AFFIRMANCE. A cause which is submitted without oral argument being made or briefs filed will ordinarily be affirmed without examination of the record. *Miller v. Lewis*, 41 Neb., 692, followed.

APPEAL from the district court of Lancaster county.
Heard below before FIELD, J.

William B. Price, for appellants.

A. G. Greenlee, contra.

HARRISON, J.

This is an appeal from a decree of foreclosure of real estate mortgages rendered in the district court of Lancaster county May, 1892, and was submitted to this court upon the record and bill of exceptions, without either oral argument or briefs filed calling attention to any alleged error or errors claimed to have been committed by the trial court. Under such circumstances it is the established rule of this court that, ordinarily, the judgment will be affirmed without an examination of the record. (*Stabler v. Gund*, 35 Neb., 648; *Zimmerman Mfg. Co. v. Tower*, 40 Neb., 306; *Miller v. Lewis*, 41 Neb., 692.) The decree of the district court is

AFFIRMED.

OLIVA PLUCKNETT V. WILLIAM TIPPEY ET AL.

FILED JUNE 18, 1895. No. 6389.

Intoxicating Liquors: SALOON-KEEPER'S BOND: CONSTRUCTION: LIABILITY OF SURETIES: EVIDENCE. Statements in the conditions of the bonds of retail liquor dealers, which were as follows: "Now, if the above bounden shall not, during the continuance of said license, keep a disorderly house, * * * and shall pay all damages, fines, and forfeitures that may be adjudged against said * * *, under the provisions of chapter 61 of the General Statutes of the state of Nebraska passed at the sixteenth legislative assembly, and approved February 28, 1887, then, in such case, the above obligation to be void, otherwise in full force and effect,"—*held*, to refer to chapter 61 of the Laws of Nebraska, 1881, as arranged and published by the secretary of state as authorized by law, and as the chapter designated contained the liquor law, the statements in the bonds sufficiently referring to the liquor law and its provisions, the bonds were valid, and it was error to exclude them from the evidence in a case on the ground that the liquor license act, or law, was not described or referred to in the conditions of the bonds.

ERROR from the district court of Saline county. Tried below before HALL, J.

F. I. Foss and Alfred Hazlett, for plaintiff in error.

Griggs, Rinaker & Bibb, *contra*.

HARRISON, J.

The plaintiff, for herself and her minor child, commenced this action in the district court of Saline county against the defendants William Tippey and George W. Schram as retail liquor dealers in the village of De Witt, in said county, and the other defendants as sureties upon bonds given when licenses were granted to the dealers to engage in the liquor business, to recover damages for the death of the husband and father, alleged to have resulted from drinking intoxi-

ating liquors obtained in the saloons of the principal defendants. The answers filed were general denials. After issues joined, a trial was had before the court and a jury, which resulted in a verdict and judgment in favor of the plaintiffs against the two saloon-keepers and a judgment of dismissal of the action as respects the defendants, the bondsmen. It appears that during the trial the plaintiff offered the bonds in evidence and that they were objected to on behalf of the sureties "as incompetent, immaterial, and irrelevant and not admissible under the pleadings, not binding upon the sureties, not being a statutory bond, not being the bond declared upon in the petition in this case, and not such a bond upon which an action of this kind can be predicated and founded." This objection was sustained and the bonds excluded from the evidence. This action of the trial court, it is alleged by counsel for plaintiff, was erroneous, and it is the only reason assigned and urged as sufficient to secure a reversal of the judgment of the lower court. The bonds in question were executed to the state, each in the sum of \$5,000, and each contained a recital of the granting of a license to sell liquors, and stated where the business was to be conducted and the length of time it was to continue under the present license and bond, and also contained the following conditions: "Now, if the above bounden * * * shall not, during the continuance of said license, keep a disorderly house, * * * and shall pay all damages, fines, and forfeitures that may be adjudged against said * * *, under the provisions of chapter 61 of the General Statutes of the state of Nebraska passed at the sixteenth legislative assembly, and approved February 28, 1887, then, in such case, the above obligation to be void, otherwise in full force and effect." The bonds did not differ except in the names of the principal and sureties and some other unessential particulars.

Section 6 of chapter 50 of the Compiled Statutes, gen-

erally known and referred to as the "Slocumb Law," provides that the bond of a retail liquor dealer shall stipulate "that he will not violate any of the provisions of this act; and that he will pay all damages, fines, and penalties and forfeitures which may be adjudged against him under the provisions of this act." It is stated by counsel that the trial court sustained the objection to the introduction of the bonds in evidence on the ground that the statement in the condition of each of them, "shall pay all damages, fines, and forfeitures that may be adjudged against said * * *, under the provisions of chapter 61 of the General Statutes of the state of Nebraska passed at the sixteenth legislative assembly, and approved February 28, 1887," did not refer to, or was not a designation of, the provisions of the act in regard to the sale of intoxicating liquors, and hence the bonds were nugatory. To determine whether the description in the condition of the bonds in question was sufficient and referred to the so-called "Slocumb Law" it will be necessary to examine a portion of the record history of its enactment and publication, etc. It seems proper here to first direct attention to the manner in which such of the record of the enactment of laws and their publication, as will be noticed in our opinion, are authorized to be and are made. In section 24 of article 3 of the constitution is the following statement: "All laws shall be published in book form within sixty days after the adjournment of each session, and distributed among the several counties in such manner as the legislature may provide;" and among the duties of the secretary of state is "to print and supervise the distribution of the laws and journals, and keep an account thereof;" also, "in the publication of the laws of this state * * * the secretary of state shall cause to be published in each volume a general certificate to the effect that the same as contained in such volume are true copies of the laws and resolutions of the legislature, as the case may be, on file in his office" (Com-

piled Statutes, 1893, ch. 83, art. 2, sec. 4); and in section 14 of chapter 68, Compiled Statutes, 1893, under the head of "Printing," we find the following: "It shall be the duty of the secretary of state to classify and arrange for publication the laws, joint resolutions, and memorials passed at each session, and to make out a full index and marginal notes to the laws as fast as shall be necessary. The signatures of the speaker of the house, president of the senate, and governor shall not be printed at the end of each law and chapter, but only at the end of the volume. The date of approval by the governor shall be affixed to each law." The foregoing, and other provisions of our laws not particularly alluded to, fully authorize the preparation in book form, arranged in appropriate chapters and properly indexed, and the publication and distribution of all laws passed at any session of the legislature. In a volume of the Laws of Nebraska, 1881, page 270, being the laws passed by the legislative assembly of this state at its sixteenth session, and duly certified by the secretary of state, under page heading "General Laws," is "Chapter 61," which contains our present "liquor law" and the one under the provisions of which licenses to sell intoxicants were obtained by the two principal defendants in this action and the bonds in question were executed, and it further appears that it was approved February 28, 1881. It seems quite clear that the statement in the bonds, "under the provisions of chapter 61 of the General Statutes of the state of Nebraska passed at the sixteenth legislative assembly, and approved February 28, 1887," pointed directly to the chapter 61 of the general laws passed by the legislature at its sixteenth session, in the volume of such laws, published and authenticated by the duly authorized officer of the state, and this being the liquor law, the description was sufficient. The fact that in the bonds the year in the date of approval was given as 1887 when it should have been, to be correct, 1881, we do not deem of particular moment,

as we do not consider it such an essential or governing portion of the reference to the law under which the damages, if any, accruing to any persons by virtue of the bonds were to be adjudged, that its lack of correctness renders the bonds invalid. The law was fully and correctly indicated without it, and it may be rejected as surplusage without materially changing the completeness of the allusion in the conditions of the bonds to the law, the provisions of which were to be covered. Nor does it, we think, when read in connection with the other portions of the statement, tend to mislead the reader in respect to the particular law to which it is its purpose to direct attention. Returning to a consideration of some other statements of the conditions of the bonds, it is true that when we speak of the "Revised Statutes" we usually mean the volume published in 1866, and the volume published in 1873 we call the "General Statutes," and the later publications are known either as the "Compiled Statutes," or the "Consolidated Statutes," and the volumes published under the direction and as arranged by the secretary of state are ordinarily called "Session Laws," yet the reference to laws or statutes in the bonds was not to "General Statutes" in the sense of the volume published in 1873, or the "Compiled Statutes," but unmistakably to the "General Statutes" (which we may read general laws, as the word "statutes" means laws and is here plainly used in such sense) passed at the sixteenth legislative assembly, this portion of the statement limiting that in regard to general laws to the ones enacted at the particular session of the legislative body stated, and chapter 61 proving to be a chapter of an authorized arrangement and publication of the general laws passed at the designated session of the legislature and to be the Slocumb law, or liquor law, the conclusion, it seems to us, must be that the description of the law in the conditions of the bonds, the provisions of which were to be covered by the bonds, was clear and complete and the bonds were valid,

and the action of the trial court, by which they were excluded from the evidence for the reason stated, was erroneous and the judgment of dismissal of the case as to the bondsmen, which followed, must be

REVERSED.

LEONORA Z. JOHNSON ET AL. V. JOSEPH G. THORPE, JR.,
ET AL.

FILED JUNE 18, 1895. No. 6002.

Mortgage Foreclosure: CONFIRMATION OF SALE: REVIEW.

In an error proceeding to secure a review of an order of confirmation of a sale of real estate, made by virtue of an order of sale issued to enforce a decree of foreclosure of a mortgage, where an examination of the record and evidence presented and considered on the hearing of the motion to confirm the sale, discloses that the conclusion reached by the trial judge was fully sustained by such record and evidence, the order of confirmation will be affirmed.

ERROR from the district court of Douglas county. Tried below before IRVINE, J.

L. D. Holmes, for plaintiffs in error.

Isaac Adams, *contra*.

HARRISON, J.

In an action to foreclose a mortgage upon the north one-half of lot 19 in J. E. Riley's subdivision of lots Nos. 54 and 55 of S. E. Rogers' plat of Oklahoma addition to the city of Omaha, such proceedings were had as resulted in a decree of foreclosure of the mortgage, to enforce which an order of sale was duly issued, directed to one Joseph Coleman as special master commissioner, and who, pur-

Johnson v. Hubbard.

suant to its commands, advertised and sold the premises and made return of the sale. The property was purchased by the defendant in error. A motion to confirm the sale was made on behalf of defendant in error, in opposition to which there was filed by plaintiff in error a number of objections to a confirmation, supported, in respect to the facts involved, by affidavits. Affidavits to sustain the motion were also filed. The court, on hearing, reached a conclusion favorable to the motion and ordered the sale confirmed, and the unsuccessful parties have prosecuted an error proceeding to this court to secure a review of such order.

Of the objections presented in the trial court to the confirmation of the sale, the plaintiff in error urges but three in this court, viz.: First, "because it does not appear that the purchaser had paid the amount of his bid before confirmation;" second, "because the property was not sold to the highest bidder;" third, "because the property was sold after the hour at which the sale was advertised had expired." We have carefully examined the whole record, including the affidavits of the parties, and it convinces us that the conclusions reached by the trial judge, that "the sale had been made in all respects in conformity to law," was warranted by the facts, and the order of confirmation, based upon such finding, proper and right; hence it will be

AFFIRMED.

IRVINE, C., not sitting.

LEONORA Z. JOHNSON ET AL. v. FREDERICK HUBBARD.

FILED JUNE 18, 1895. No. 6003.

Mortgage Foreclosure: CONFIRMATION OF SALE: REVIEW.

Following the decision in the case of *Johnson v. Thorpe*, 45 Neb., 347, the decree or order of confirmation in this case is affirmed.

ERROR from the district court of Douglas county. Tried below before IRVINE, J.

L. D. Holmes, for plaintiffs in error.

Isaac Adams, *contra*.

HARRISON, J.

This case in the points argued and presented for adjudication and the facts and incidents connected with them as disclosed by the record do not differ in any material instance from those involved in the case of *Johnson v. Thorpe*, 45 Neb., 347, and following the decision in that case, filed of this date, the decree or order in this is

AFFIRMED.

IRVINE, C., not sitting.

WESLEY J. COOK ET AL. V. BYRON F. MONROE.

FILED JUNE 18, 1895. No. 6222.

1. **Corporations: OWNERSHIP OF DIVIDENDS.** Dividends declared by a corporation upon shares of its stock belong to the parties in whose names the shares of stock are registered in the books of the corporation at the time the dividends are declared, but such dividends may be made the subject of a valid contract, in like manner and to the same extent as other personal property.
2. **Tort-Feasors: DAMAGES.** One who interferes with personal property not his own, at the instance and request or by the authority of another who is not the owner of the property or authorized to act, is a wrong-doer and, as such, liable to the owner of the property for his wrongful act.
3. **Corporations: OWNERSHIP OF DIVIDENDS: EVIDENCE.** The admitted, coupled with the undisputed facts, in this case fully warranted the trial court in directing the jury to return a verdict for plaintiff for the amount claimed.

ERROR from the district court of Washington county.
Tried below before OGDEN, J.

F. W. Fitch and *D. Z. Mummert*, for plaintiffs in error.

Jesse T. Davis and *Edward R. Duffie*, *contra*.

HARRISON, J.

It is alleged in substance in the petition filed in this action commenced in the district court of Washington county that on January 30, 1892, the defendant in error (plaintiff in the district court and hereinafter referred to as plaintiff) was the owner of twenty shares of the capital stock of the Keeley Institute at Blair, Nebraska, of the face value each of \$100, and on that day he sold and transferred the stock stated to Clement L. Hart, one of the plaintiffs in error (hereinafter called defendant and defendants), who, as a consideration of such sale and transfer of stock, executed and delivered to plaintiff his three certain promissory notes in the sum of \$1,000 each, payable one in twenty days, one in six months, and one in one year after date, and also conveyed to plaintiff a quarter section of land situated in Howard county. Some time thereafter defendant became dissatisfied with the trade and began an action in the district court of Douglas county against the plaintiff, praying that he might be enjoined from selling or disposing of the notes and land, and that a decree be entered ordering the plaintiff to return the notes to the defendant Hart and reconvey the land to him. During the pendency of the injunction suit, the plaintiff sold and assigned one of the notes to E. H. Monroe, who commenced an action in the district court of Washington county against plaintiff and Clement L. Hart to collect the amount due on the note. That on November 11, 1892, the plaintiff and the defendant entered into a stipulation by which their legal differences arising out of the trade were settled, and which was as follows:

"CLEMENT L. HART, PLAINTIFF,
v.
BYRON F. MONROE, DEFENDANT." } Stipulation of Dis-
missal.

"It is hereby stipulated and agreed by and between the parties plaintiff and defendant in the above entitled cause that this case be, and the same is hereby, dismissed upon the following terms and conditions:

"1. That the defendant herein return to the plaintiff the three certain promissory notes in plaintiff's petition described of one thousand dollars each, dated Blair, Nebraska, January 30, 1892, and payable in twenty days, six months, and one year from the date thereof, respectively, to Byron F. Monroe and signed by C. L. Hart, and re-deed and quitclaim to the plaintiff the land in the plaintiff's petition described, consisting of one hundred sixty acres in Howard county, Nebraska, being the southeast one-fourth ($\frac{1}{4}$) of section twenty-nine (29), township fourteen (14), range nine (9) west of the 6th P. M., as free from incumbrance and bearing as good title as it did January 30, 1892.

"2. The plaintiff agrees to pay the costs now accrued in this cause and in the cause of Monroe v. Hart in the district court of Washington county, Nebraska, and return to the defendant the twenty certain shares of capital stock of the Keeley Institute at Blair, Nebraska, and assign the same to defendant, together with all accretions, interests, and gains thereto belonging, and pay to the defendant the sum of \$175."

That pursuant to the stipulation the notes were returned to defendant and the land reconveyed to him, the shares of the stock were assigned to plaintiff's wife, the \$175 paid, and the suits at law dismissed. On March 25, 1892, and during the time the shares of stock stood on the books of the Keeley Institute in the name of defendant and were in his possession, the institute declared a dividend, the owner of the shares of stock in question being entitled to the sum

Cook v. Monroe.

of \$252.18, which amount remained in the treasury of the institute until January 4, 1893, and until after the stock was reassigned by defendant and returned to plaintiff; that on the 4th day of January, 1893, the defendant Wesley J. Cook, by means of an order therefor, signed by his co-defendant, drew the \$252.18 from the treasury of the institute and appropriated the same to his own use and benefit and to the use and benefit of Clement L. Hart; and it is further charged that this was done with full knowledge on the part of Cook of the conditions of the agreement of settlement between plaintiff and C. L. Hart, and was done for the purpose of cheating and defrauding the plaintiff of the amount stated. Clement L. Hart filed what was denominated a special answer, which contained a plea to the jurisdiction of the court on the grounds that the answering defendant was not a resident of Washington county and not therein at the time the action was begun or the summons issued or served; that any service of process in the suit issued from Washington county and made upon him in Douglas county was illegal and void; that Wesley J. Cook was not a proper party to the action, but was made a defendant for the sole purpose of obtaining service of process upon him in Washington county that a summons might issue to Douglas county to be served there upon the answering defendant. Defendant Wesley J. Cook answered, admitting the declaring of the dividend on the date and in the sum stated in the petition, and alleging that at some date early in the month of January, 1893, he was in Omaha on business of his own and there met his co-defendant, who informed the defendant that the dividend had been declared by the institute and its amount, and that he was the owner of it and requested the answering defendant to draw the dividend and send it to Hart at Omaha, and gave him an order to enable him to receive the money, which he did, and on the 5th day of January, 1893, or the next day after he received the money, he was again in Omaha and

saw his co-defendant and gave the money to him, taking his receipt therefor. It is further stated that this was all done to accommodate Hart and without any compensation, and without knowledge of the stipulation between the plaintiff and Hart, or any of its terms or conditions, or that the plaintiff had or claimed any right or interest in or to the money. It was also alleged that the action was commenced against the answering defendant for the sole purpose of serving process upon him in Washington county in order to give the court there jurisdiction of the case and to issue process to be forwarded to Douglas county and served upon the defendant Hart, there being no cause of action against the answering defendant, and as to all other allegations of the petition this answer was a general denial. A reply was filed to the answer of the defendant, whose answer we have just noticed, which consisted of a denial of the allegation of the payment of the money received from the institute by Cook to Hart, and also a denial that Cook was made a defendant in order that the suit might be maintained in Washington county and summons issued and served upon Hart in Douglas county. A trial was had of the issues joined between plaintiff and defendant Wesley J. Cook, and at the close of the testimony counsel for such defendant moved the court to instruct the jury to return a verdict for the defendant. The court did not do this, but did instruct the jury to return a verdict for plaintiff for the sum claimed, which the jury accordingly did, and after motion for a new trial on behalf of defendants was heard and overruled, judgment was rendered on the verdict, and the case is presented here by an error proceeding on the part of defendants.

There are several questions discussed in the briefs in regard to the ownership of the dividends when drawn and the liability of Clement L. Hart, and also of Wesley J. Cook, to plaintiff, for their amount, based upon the action of these parties in collecting the dividends from the insti-

tution. The rulings of the trial court in refusing to instruct the jury, as requested by defendant to return a verdict in favor of defendants, or generally, as set forth in a number of instructions offered and rejected, and also in directing a verdict for the plaintiff, and some other alleged errors, we think, all depend upon the determination of the main questions as to whether Hart had any right, as between him and the plaintiff, to draw the dividends, and if not, and his doing so, or causing it to be done, rendered him liable to plaintiff for the amount received, did the participation of the defendant Cook in the transaction render him also liable to plaintiff for the sum drawn. It is doubtless true that when a dividend is declared by a stock concern or corporation, it belongs, as between the corporation and the owners of the stock, to the person in whose name the stock then appears upon the stock books or lists of the corporation; but a stockholder may sell or transfer his shares of stock with or without gains or accrued dividends, and a dividend which has been declared may be made the subject of a contract, or a contract may be entered into regarding it, in the same manner and to the same extent, and as valid and binding as one in reference to any other kind of personal property. (Cook, Stock & Stockholders, secs. 540, 541; Morawetz, Private Corporations, sec. 162.) The contract embodied in the stipulation pleaded in the petition, and in evidence in this case, was one by which the parties clearly sought to completely rescind the exchange or trade which had at a prior date been effected between them, and without doubt transferred to the plaintiff such a right or ownership to the dividends in controversy as entitled him to bring this action against the defendant Clement L. Hart for drawing them or causing them to be drawn, and receiving and appropriating them to his own use. In reference to the liability or non-liability of the defendant Wesley J. Cook, if all that is claimed in his behalf, that he had no knowledge of the settlement and stipulation between the

plaintiff and Clement L. Hart, or that the plaintiff had or claimed any interest or ownership in or to the dividends, and that he received the order from Hart and took it to Blair and there drew the dividends and carried the amount to Omaha and delivered it to Hart, and, moreover, without the receipt of any compensation for so doing, be true, still must he be held to respond to the suit of the plaintiff for the amount of the dividends, for, as was stated by REESE, J., in the case of *Stevenson v. Valentine*, 27 Neb., 338: "Under the usually adopted principle of law that he who intermeddles with personal property which is not his own must see to it that he is protected by the authority of one who is the owner or has authority to act, or that he will be himself liable; and that if he do an unlawful act, even at the command of another acting as principal, and without right, a liability will attach." In the case at bar Clement L. Hart possessed no further right as against or relative to the right of plaintiff to draw, or exercise any acts of ownership in respect to the dividends, and consequently could confer no valid authority upon Cook to perform any such acts, and the act by which Cook obtained possession of the dividends was wrongful, although it was by or through the request or order of Hart, for whom and at whose instance he claims he was acting in collecting the dividends from the institute. His receipt of the money embraced in the dividends was wrongful and he must abide the consequences. Nor will it avail him as a defense to the action of the plaintiff for the property or money so received that he has delivered or paid the same to the party for whom he claims to have drawn it. (Dicey, Parties to Actions, 277.) On the admitted or undisputed facts of the case, the action of the trial court in directing a verdict for the plaintiff was fully warranted and proper. The judgment of the district court is

AFFIRMED.

FREMONT BUTTER & EGG COMPANY V. PETERS & SON.

FILED JUNE 18, 1895. No. 6297.

1. **Actions Against Corporations: VENUE: STARE DECISIS.**

It is conceded by counsel for plaintiff in error that the facts in the case at bar and the rules of law applicable thereto are substantially similar to those in the case of *Fremont Butter & Egg Co. v. Snyder*, opinion in which is reported in 39 Neb., beginning on page 632, and to the extent that the points of alleged error stated in the briefs and relied upon in this case were in that considered and decided, it is followed and adhered to, and such points will not be here again discussed or the conclusions restated in the syllabus.

2. **Record for Review: EVIDENCE IN SUPPORT OF MOTIONS:**

PRACTICE: BILL OF EXCEPTIONS. Where certain papers of the files of the trial court, evidential of the facts supporting the grounds of a motion filed and which are referred to in the motion and made a part thereof, to be considered with it, which appear to be necessary to its proper examination and determination, must be brought up with the record and preserved in the bill of exceptions. If this is not done the ruling of the trial court upon the questions presented by the motion cannot be reviewed in this court.

3. **Trial: EVIDENCE.** Statements or admissions made by a witness out of court in conflict with his testimony on the trial may be shown in cross-examination. *Markel v. Moudy*, 13 Neb., 322, followed.

4. ———: ———. The action of the trial court in sustaining objections to a certain interrogatory during redirect examination examined, and held not erroneous.

ERROR from the district court of Saunders county.
Tried below before WHEELER, J.

George W. Simpson and Frick & Dolezal, for plaintiff in error.

George I. Wright and J. R. Gilkeson, contra.

HARRISON, J.

This action was commenced in the district court of Saunders county by Peters & Son against the Fremont Butter & Egg Company, a corporation, to recover the sum of \$312.80, alleged to be due on account for merchandise sold and delivered to the corporation. The answer of the corporation contained a general denial and also a further plea of certain facts which it is claimed, if proved, would establish that the court had no jurisdiction over the subject-matter nor the corporation. Judgment was rendered against the corporation in the trial court and it has removed the case to this court for review. The cases of F. J. Snyder & Co. and Killian Bros. & Co. against the same corporation, tried in the district court of Saunders county, and in both of which the corporation was unsuccessful and brought to this court by proceedings in error, were, as to the issues joined by the pleadings, similar to the case at bar, and assignments of error in those cases raised for examination and decision points similar to the questions presented to this court in the case at bar with two exceptions. The cases referred to have been reached for decision and an opinion was filed in the one, which was followed in the other, for a report of which see 39 Neb., 632-636. The conclusions therein reached and announced, being applicable in the present case, will be followed and adhered to. Before the trial of this case in the district court a motion was filed on behalf of Peters & Son, as follows: "Now comes the plaintiff and moves the court to strike out of the defendant's answer the second defense therein set forth, for the reason that the same is immaterial and waived and cannot at this time be pleaded in bar to the action. Plaintiff refers to and makes a part of this motion the transcript of the lower court, the appeal bond, the original summons, and the answer of the said defendant in the lower court, which are now on file in this court in this case." This

was sustained, and the portion of the answer alluded to was ordered stricken out, to which action counsel for defendant excepted and have made it the subject of one assignment of error. Presumably the trial court had before it the papers in the case, to which reference is made in the motion, and the facts disclosed by them entered into its consideration and assisted it in arriving at the conclusion it did in regard to the disposition to be made of the motion. The transcript, appeal bond, original summons in the case, and answer filed in the court inferior to the district court are not in or of the bill of exceptions or other portion of the record filed in this court. Owing to this incompleteness of the record in relation to the motion we are unable to determine whether the ruling of the trial judge was erroneous or wholly right and proper, and cannot, therefore, review it.

The only further assignments of error which we need notice are as follows:

"The court erred in admitting in evidence the paper marked 'Exhibit DD, Dec. 7, 1892, Geo. F. Corcoran, Official Reporter,' and to the admission of which plaintiff in error duly excepted.

"The court erred in refusing to allow the plaintiff in error to prove by the witness George Haskell the facts offered by plaintiff in error to be proved by said witness in relating to said letter Exhibit 'DD,' aforesaid, and to which plaintiff in error then excepted, as shown on page 177 of bill of exceptions."

Exhibit "DD," referred to in the assignment quoted, was as follows:

"FREMONT, NEBRASKA, Sept. 2, 1889.

"To whom it may concern: This is to certify that Mr. J. Darrah, of Wahoo, is our authorized agent to purchase butter and eggs. Any drafts he may make on us in payment for same will be duly honored. Yours truly,

"FREMONT BUTTER & EGG Co.,

"J. DIXON AVERY, *Mgr.*"

It is insisted by counsel for the corporation that it was error to admit this exhibit, for the reason that it was not competent as proof of the agency of the party named in it, Mr. Darrah, being a statement made by the witness, Mr. Haskell, at a time when he possessed no other position than that of book-keeper for the corporation and had no authority to and could not bind it by his statements, either verbal or written, in regard to its agents; second, that it was no part of a cross-examination; and they further contend that after admitted it was error for the court to refuse to allow them to interrogate the witness in respect to it in the redirect examination. Counsel for Peters & Son insist that the letter or exhibit in question was not introduced on their part as substantive evidence of the fact of the agency of Mr. Darrah, but for the sole purpose of showing that the witness then undergoing cross-examination had made a written statement in relation to such fact differing from and contradictory of his testimony during the trial. The witness to whom reference has been made was G. E. Haskell, who, while testifying as a witness called on the part of the corporation, was interrogated during his direct examination in regard to J. Darrah and his connection with the corporation in the capacity of agent and answered as follows:

Q. Now, were you acquainted with J. Darrah during the time he was in business in Wahoo?

A. Yes, sir.

Q. Do you know of his being in business here?

A. I do.

Q. What do you say?

A. Yes, sir.

Q. In what business?

A. In the butter and egg business.

Q. You may state whether he had any connection with the Fremont Butter & Egg Company, defendant in this action, while he was in business here, if he was connected with the defendant in any way?

A. He was not.

And during his cross-examination testified in this connection and also in respect to "Exhibit DD." We here further quote the record showing the actions of the court and counsel with reference to the admission of the exhibit:

Q. Then unless it was at the time he had charge of, the time he was working the butter at the creamery, he never had any connection with the defendant company as an agent?

A. Never while I was there as an agent.

Q. Never did at any time?

A. No, sir.

Q. Did he ever make a statement he was an agent of the company?

A. He did.

Q. That was in the fall of 1889?

A. Yes, sir.

Q. You may look at exhibit marked "DD" and answer whether or not that is a statement you made in reference to his being an agent of the defendant?

A. I wrote that.

Q. That is something you wrote?

A. Yes, sir.

Plaintiff offers letter marked Exhibit "DD" in evidence as part of the cross-examination of this witness. Objected to, incompetent, immaterial, irrelevant, because no sufficient foundation has been laid, and because not proper cross-examination. Overruled. Defendant excepts.

Exhibit "DD" read to the jury.

The quotation we will now give shows what was done as to this branch of the testimony during the redirect examination of this witness:

Q. You did not have any of the direction or control?

A. None, only as I was told.

Q. By whom?

A. Mr. Avery.

Q. You may state whether or not you had any authority to sign Mr. Avery's name to any papers?

A. Only as he instructed me to sign letters when he was away.

Q. Did you have any authority or direction from him to sign the letter to which your attention has been called or directed, and has been introduced in evidence here?

Objected to, not proper re-examination, immaterial, incompetent. Sustained. Defendant excepts.

The defendant offers to prove by this witness that the letter introduced in evidence that is marked Exhibit "DD" was a letter written by himself without any authority from Mr. Avery or any one else, and thereby he had no authority to write that letter, and it was written at the special instance of Mr. Darrah, for a special purpose, on a special promise made to the witness by Mr. Darrah. Offer objected to, incompetent, immaterial. Sustained. Defendant excepts.

From a perusal of the record of the testimony of the witness when asked if Mr. Darrah had ever acted as agent for the corporation and of the introduction in evidence of the exhibit and the testimony given immediately preceding its introduction, we conclude to accept the statement of counsel offering it, as to the purpose for which it was offered—that it was to impeach or discredit the witness and his evidence by proving by it his contradictory or different statement to that made in his testimony given at the trial. The question then arises, was it error or was it proper to allow it to be introduced and read during the cross-examination, or should the action at the time indicated have been restricted to its identification by the witness, and its offer and reception in evidence occurred as a proper portion of the testimony for Peters & Son? The latter course is the usual, proper, and established one, and ordinarily should be followed; but the order in which testimony should be received is discretionary with the trial court, and may be

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varied, and where no prejudice results, if its admission out of the regular order is erroneous, it is not reversible error; but in the case at bar the piece of evidence (Exhibit "DD") was material and competent for the purpose of impeachment as a statement directly contradictory of what had been said by the witness on the same subject, both during his examination in chief and cross-examination, and might have been introduced (as it was) in connection with and at the time of his admission that he had made it. See *Markel v. Moudy*, 13 Neb., 322, where "on the cross-examination of Joseph Moudy, one of the parties to the suit, who had testified in chief in support of the alleged unprofitableness of the business, he was shown the following notice which he admitted was given by himself: 'For Sale.—Railroad eating house, with furniture and good-will, on the line of the Union Pacific R. R. in Nebraska; regular eating house for all trains; large trains and large profits; terms, part cash and part on time. For particulars address J. Moudy, Fremont, Neb.' Thereupon it was offered in evidence, but the court excluded it on an objection made by the defendants in error that it was 'irrelevant, incompetent, and not proper cross-examination.' This was error. The notice was certainly admissible over this objection. It was a concession by the witness made out of court, and in conflict with the testimony he had given to the jury. It was the right of the plaintiffs in error to have the notice itself go hand in hand with the admission of the witness that he had given it." Under the rule announced by this court in that case, there was no error committed in admitting the statements contained in Exhibit "DD" during cross-examination in this case. Counsel for the corporation strenuously insist that if it was for any purpose or in any sense proper to admit Exhibit "DD" in evidence, then the trial court erred in refusing to allow the witness to answer an interrogatory during redirect examination in relation to the authority or direction which the witness had, if

any, from Mr. Avery, the general manager of the corporation, to sign such statement. Counsel had the right during the re-examination of the witness to ask any questions which tended to elicit from the witness an explanation of the sense and meaning of the matters contained in the exhibit, if any of the expressions therein were doubtful in such particulars, or to show the motives of the witness which actuated him to make the statements (1 Greenleaf, Evidence, sec. 467), but the question asked, "Did you have any authority or direction from him [Mr. Avery] to sign the letter to which your attention has been called or directed and has been introduced in evidence here?" was not calculated to call forth a response from the witness in respect to either the meaning of the declarations of the letter or the motives which induced the witness to make them. Had the exhibit been introduced by the parties by whom it was offered, as a piece of substantive evidence in their behalf, at the proper time for such introduction, and to prove the facts contained in the statements, then, at the proper time for such interrogatories on behalf of the corporation, the question quoted would have been competent, but, as the letter was introduced merely for the purpose of showing that the utterances therein were contradictory of those made by the witness at another time, and for no other purpose, the interrogatory was not proper during redirect examination, and the action of the court sustaining the objection to it was not erroneous. The judgment of the district court is

AFFIRMED.

EDWARD C. CARNES ET AL. V. LOUIS HEIMROD.

FILED JUNE 18, 1895. No. 6292.

1. **COSTS: ATTORNEYS' FEES: INJUNCTION.** Attorneys' fees, ordinarily, are not recoverable in this state for services rendered in an attempt to dissolve a temporary restraining order pending the hearing of a motion to allow a temporary injunction.
2. **Review: MOTION FOR NEW TRIAL.** In the absence of a motion for a new trial the supreme court cannot determine whether or not there were errors of law in a trial in the district court.

ERROR from the district court of Douglas county. Tried below before DAVIS, J.

Frank T. Ransom and Blair & Goss, for plaintiffs in error, cited, as to the right to recover attorneys' fees: *Miles v. Edwards*, 6 Mont., 180; 1 Sutherland, Damages, p. 141; High, Injunctions, secs. 973, 974; *Ah Thaie v. Quan Wan*, 3 Cal., 216; *State v. Wakeley*, 28 Neb., 437.

Smith & Sheean and Mahoney, Minahan & Smyth, contra, cited: High, Injunctions, secs. 1685, 1692; *Hicks v. Michael*, 15 Cal., 107; *Winkler v. Roeder*, 23 Neb., 709; *Atkins v. Gladwish*, 25 Neb., 390; *Oelrichs v. Spain*, 15 Wall. [U. S.], 211.

RYAN, C.

This action was brought in the district court of Douglas county for the recovery, as damages, of such attorneys' fees as plaintiff alleged had been earned in procuring to be dissolved a temporary restraining order made in an action which had been pending in said district court wherein said E. C. Carnes was plaintiff and Louis Heimrod was defendant. The undertaking which formed the basis of the plaintiff's alleged cause of action was not introduced in

evidence, and there is to be found in the record no copy of the original restraining order by which such undertaking was required. In *State v. Wakeley*, 28 Neb., 431, it was held that an order of this kind did not amount to, or take the place of, a temporary injunction, for which reason the application for a *mandamus* requiring the district judge to fix the amount of the penal sum of an undertaking of the nature of that above referred to was denied. In the case just cited was this language: "It is very clear that the legislature never intended to give the force and effect to a restraining order which attaches to an injunction when regularly allowed. It simply suspends proceedings until an opportunity can be given for the parties to be heard, and upon that hearing having been had, and a decision rendered upon the application, the whole force of the restraining order ceases by its own limitation." The restraining order above contemplated was one which had force and effect until the motion for the allowance of a temporary injunction could be disposed of. It might be, that such an order in this case fixed a very early date as that on which the motion just mentioned would be heard or determined. In such case the preparation would be for the hearing of the motion to allow the temporary injunction prayed, for the reason that little or nothing could be gained by moving to dissolve the restraining order. Possibly this consideration may have influenced the district court to hold that the services rendered, for which compensation is now sought to be recovered, were rendered rather with reference to defeating an order for temporary injunction than dissolving the temporary restraining order which preceded the hearing of the motion for the allowance of such temporary injunction. The evidence of Mr. Ransom, who alone testified as to the nature and value of the services rendered by the attorneys, coupled such services as having been rendered to secure a dissolution of the restraining order with the effort to prevent the allowance of

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the temporary injunction. Whatever proportion of fees was allowable for the latter class was not contemplated by the undertaking upon which this suit was brought, therefore, for this no recovery could be had on such undertaking. Attorneys' fees for the dissolution of a temporary restraining order are recoverable, if at all, only in exceptional cases, of which that under consideration is not one. It seems to be laid down in *Miles v. Edwards*, 6 Mont., 180, that a different rule should prevail. The views of the court by which the above case was decided are so radically different from the understanding which this court has of the purpose of a restraining order that the case cited tends to mislead rather than to aid our judgment. By that court a restraining order is regarded as having much the same purpose, and therefore as being subject to like rules with those which govern temporary injunctions. The district court properly denied the right to a recovery of attorneys' fees in the case at bar, for such a recovery was not within the conditions of the undertaking sued upon. The defendant, in his answer, sought to recover such fees as had been earned, and which he alleged were due him for services rendered while he was deprived of the office of oil inspector and its emoluments. Proof was tendered of the amount of these fees, but was rejected by the district court. We are not able to enter upon an investigation of the question, for the reason that while the record recited the ruling on defendant's motion for a new trial, the motion itself cannot be found. The judgment of the district court is

AFFIRMED.

WILLIAM G. BALL v. MARY J. WICKS.

FILED JUNE 18, 1895. No. 6534.

Corporations: FAILURE TO PUBLISH NOTICE OF INDEBTEDNESS: ACTION AGAINST STOCKHOLDERS. An action to enforce the statutory liability of a stockholder arising from a corporation's failure to publish an annual notice of its indebtedness as required by law, cannot be maintained until after a judgment has been rendered against such corporation by which has been judicially ascertained the amount owing by it. Following *Globe Publishing Co. v. State Bank of Nebraska*, 41 Neb., 175.

ERROR from the district court of Harlan county. Tried below before BEALL, J.

C. C. Flansburg, for plaintiff in error.

James McNeny, contra.

RYAN, C.

In the petition of the defendant in error it was alleged that said defendant in error had entrusted to the Nebraska & Kansas Farm Loan Company, a corporation, a promissory note for the sum of \$700 and interest for collection; that said collection had been made, but that the said corporation at the time it received and collected said note was insolvent, and had failed to pay the amount collected; that the defendant was a stockholder in said corporation, which for more than a year before it became liable for the aforesaid collection had failed to publish the notice of its indebtedness required by law, wherefore it was claimed that the plaintiff was individually liable for the payment of the amount of the aforesaid collection. Upon a trial, without a jury, the district court of Harlan county, wherein this cause was pending, held the plaintiff in error responsible for the default of the said corporation and rendered judgment accordingly.

Tolerton & Stetson Co. v. McClure.

The Nebraska & Kansas Farm Loan Company was a Nebraska corporation and became indebted to the defendant in error in April, 1891. The judgment against the plaintiff in error was rendered on May 25, 1893, although against the delinquent corporation no judgment was ever alleged or shown to have been rendered. The case therefore falls within the rule laid down in *Globe Publishing Co. v. State Bank of Nebraska*, 41 Neb., 175. The judgment of the district court is

REVERSED.

TOLERTON & STETSON COMPANY V. MCCLURE, HAGGERTY & COMPANY.

FILED JUNE 18, 1895. No. 6313.

1. **Trial to Court: ADMISSION OF INCOMPETENT TESTIMONY.** In a cause tried to the court without the intervention of a jury the admission of incompetent evidence is not reversible error. Following *Whipple v. Fowler*, 41 Neb., 675.
2. **Sufficiency of Evidence: REVIEW.** The findings of fact of the district court which are supported by sufficient evidence will not be disturbed in error proceedings upon the assignment that the judgment is against the weight of the evidence.

ERROR from the district court of Holt county. Tried below before BARTOW, J.

W. H. Farnsworth, for plaintiff in error.

H. M. Utley, contra.

RYAN, C.

In this court Tolerton & Stetson Co., an Iowa corporation, is the plaintiff in error, and the firm of McClure, Haggerty & Co. is the sole defendant in error. The party

last named began this action May 18, 1888, in the district court of Holt county for the foreclosure of a mortgage made by John C. Hayes and his wife. This mortgage was of date, and was filed for record, November 3, 1887. On the day last mentioned suit was begun in said district court by plaintiff in error against John C. Hayes, in which suit on the same day an attachment was levied upon the real property described in the aforesaid mortgage. There was rendered a judgment on December 12, 1887, in favor of plaintiff in error against John C. Hayes in the aforesaid attachment suit for the sum of \$1,033, and the attached property was ordered sold. In the foreclosure action the plaintiff in error, as a judgment creditor of John C. Hayes, was joined with him as a defendant and answered in denial of the existence of an indebtedness from Hayes to the petitioner for foreclosure, and alleging that the mortgage was fraudulent as to creditors of Hayes. A decree was entered as prayed by the defendant in error.

There are assignments of error pertaining to the competency of certain evidence which need not be considered, since this cause was tried to the court without the intervention of a jury. (*Whipple v. Fowler*, 41 Neb., 675.) There was ample evidence to sustain the findings of the district court. Its judgment is therefore

AFFIRMED.

CHADRON BUILDING & LOAN ASSOCIATION, APPELLEE,
v. E. L. HAMILTON ET AL., IMPEADED WITH L.
A. BROWER ET AL., APPELLANTS.

FILED JUNE 18, 1895. No. 5616.

1. **Lien of Judgment.** The lien of a judgment does not exceed the actual interest the judgment debtor had in the land at the time a transcript of such judgment rendered by a justice of the

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peace was filed in the office of the clerk of the district court of the proper county, and such judgment lien is subject to every equity at that time existing against the judgment debtor.

2. ———: MORTGAGES. Where land intended to be included in a mortgage is omitted by mistake, and a transcript of a judgment against the mortgagor is subsequently filed in the office of the clerk of the district court of the proper county, the lien of the judgment creditor is subject to the equity of the mortgage.

APPEAL from the district court of Dawes county.
Heard below before KINKAID, J.

Spargur & Fisher, for appellants.

T. F. Powers and *J. L. Caldwell*, *contra*.

RYAN, C.

On July 30, 1891, the Chadron Building & Loan Association filed in the office of the clerk of the district court of Dawes county its petition praying for the foreclosure of a mortgage executed August 15, 1889, to it by E. L. Hamilton and his wife. This mortgage was filed for record September 9, 1889. Incidentally there was sought the reformation of said mortgage so as to describe correctly the west half of the southeast quarter instead of the mistaken description of the west half of the southwest quarter of the same section as was included in the mortgage. There were made defendants with the mortgagors certain judgment creditors of E. L. Hamilton, to-wit, Lewis Ross & Co., L. A. Brower, and Charles Morrissey, of whom only the two last named appeal. The judgment in favor of L. A. Brower was by confession in the county court for the sum of \$100, and of it a transcript was filed in the office of the clerk of the district court of Dawes county March 3, 1891. Charles Morrissey obtained his judgment against E. L. Hamilton before Omaha H. Wilson, a justice of the peace of Dawes county, for the sum of \$150 on June 22, 1891, and on the same day a transcript thereof was filed in the office

of the clerk of the district court aforesaid. The service of the summons in the foreclosure proceedings was made on both Morrissey and Brower, August 9, 1891. It is claimed by the appellees that upon the summons were indorsed the words "Injunction allowed," and as it was the duty of the clerk to make this indorsement, it is presumable that this claim is well founded, in the absence of a showing by the appellant's transcript what indorsements, in fact, were upon said summons. There was issued on a judgment rendered in favor of Lewis Ross & Co. against E. L. Hamilton an execution, on which the land, against which the mortgage was sought to be made operative in the foreclosure proceeding, was, on August 12, 1891, sold to Charles Morrissey. On the 24th day of the last named month said execution sale was confirmed and a deed was then ordered to issue to Charles Morrissey. It does not appear from the record that the sheriff ever issued a deed under this confirmation. In the foreclosure proceedings the answer of Morrissey and that of Brower were simply general denials. It is quite evident that the intention of Morrissey in the foreclosure case was to avail himself of the mistake in the mortgage being foreclosed by virtue of his status, first, as a judgment creditor, and second, as a purchaser under the execution which issued on the judgment in favor of Lewis Ross & Co., which latter was obtained long after the filing for record of the mortgage sought to be questioned. The evident purpose of Brower was to avail himself of the lien of his judgment against Hamilton to accomplish the same design entertained by Morrissey. The same principles apply as to the claims of each, therefore only one will be discussed. The attempt of Morrissey to avoid the effect of the loan and building association's reformation of Hamilton's mortgage by a purchase was ineffectual, for the reason that his purchase was with knowledge of the pendency of the association's foreclosure action in which the reformation was prayed, and in avoidance of

the injunction sought as auxiliary thereto, which was not only against the sale on the judgment in Morrissey's favor, but as well was against a sale on the judgment in favor of Lewis Ross & Co. In any event Morrissey's evidence of title was not complete, for no sheriff's deed appears to have ever issued to him. The mere judgment lien in favor of Morrissey did not exceed the actual interest which E. L. Hamilton held at the date of the filing of the transcript of the judgment against him in the office of the clerk of the district court of Dawes county, and was subject to every equity existing against said judgment debtor at that time. This was recognized as the correct rule in *Galway v. Malchow*, 7 Neb., 285, and in that case it was also held that the lien of a judgment could not prevail over that of a prior mortgage with respect to lands by mistake omitted therefrom. This doctrine is also recognized and approved in *Dorsey v. Hall*, 7 Neb., 460, and in *Norfolk State Bank v. Murphy*, 40 Neb., 735. These considerations served to justify the decree of the district court, which was adverse to the claims of Brower and Morrissey.

Other questions are argued, such as the fact that the mortgage was security for a bond and that no proof was made of the amount really due thereon. It is true, the obligation secured was designated a bond, and yet it in fact was merely an obligation to pay a certain sum of money under prescribed conditions, which conditions it was alleged existed at the time the foreclosure decree was entered. There was sufficient proof of the existence of these conditions. No other evidence was therefore required except the undertakings of the bond and mortgage. The judgment of the district court is

AFFIRMED.

WILLIAM F. HAVEMEYER ET AL., APPELLEES, V.
GEORGE J. PAUL, APPELLANT, ET AL.

FILED JUNE 18, 1895. No. 7400.

1. **Mortgage Foreclosure: SUPPLEMENTAL PETITION: FAILURE TO NOTIFY DEFENDANT: EFFECT OF DECREE: EVIDENCE.**

In a suit to foreclose a mortgage the owner of the equity of redemption was personally served and answered in the time fixed by statute, traversing the material allegations of the petition. After such answer day, by leave of court, but without notice to said defendant, the plaintiff filed a supplemental petition to recover moneys which he alleged he had paid out to insure the mortgaged property subsequent to the bringing of the suit. *Held*, (1) The court erred in permitting the supplemental petition to be filed without notice thereof to the defendant; (2) the defendant, having answered, was bound to take notice of any reply to such answer which the plaintiff might make, but he was not compelled to take notice of the supplemental petition filed in the case; (3) the defendant had a right to presume that the court would render no other or different decree in favor of the plaintiff than that prayed for by him in his original petition; (4) that because the defendant had answered the petition of the plaintiff within the time required by law, it would not be presumed that he had actual knowledge of the filing of the supplemental petition; (5) that the plaintiff, by filing the supplemental petition, in effect brought another suit against the mortgaged property and all the parties to the original action; and the defendant, without notice of the filing of such supplemental petition, in the absence of some act of his by which he waived such notice, was no more concluded by the decree rendered thereon than he would have been by a decree rendered in favor of the plaintiff on his original petition without the notice or service of summons; (6) the evidence examined and found insufficient to support the finding and decree of the district court in favor of the plaintiff on the cause of action set out in his supplemental petition.

2. —: **NOTICE OF DEFENDANT'S CROSS-BILL.** To such suit a number of persons were made co-defendants with said owner, but not served with process. After the answer day of such owner the co-defendants filed answers claiming liens upon the mortgaged property. No notice of the filing of these answers was given

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the owner either before or after they were filed. *Held*, (1) That though the Code abrogated the old chancery practice requiring defendants claiming affirmative relief to file cross-bills and serve notice thereof on parties to be affected thereby, it did not abolish the principle that a party is entitled to notice of judicial proceedings instituted against him or his property; (2) that the answers of the co-defendants were in effect suits against the owner of the mortgaged property, and he was not charged with notice of the filing of such answers, because he had been served with process and answered the petition of the plaintiff within the time required by law.

3. **Parties: PLEADING: NOTICE OF CROSS-BILLS.** A party made defendant to an action and duly served with process is charged with notice of whatever answer any of his co-defendants may file in the action only when such answer is filed by such co-defendant within the time required by law. *Arnold v. Badger Lumber Co.*, 36 Neb., 841, and cases there cited followed and reaffirmed.
4. **Contracts: RATE OF INTEREST.** The mortgage bond made the subject of said suit drew interest at six per cent per annum from date until maturity, and ten per cent per annum after maturity. *Held*, That a decree based on said bond drawing interest at seven per cent per annum was not one of which the mortgagor could complain.
5. **Negotiable Instruments: RATE OF INTEREST.** Where a note provides for a lawful rate of interest from date until maturity and a higher and lawful rate of interest afterwards, the rate of interest which the note draws from its date to maturity is the contract rate for that time; and the rate which the note draws after maturity is the contract rate from that date within the meaning of section 3, chapter 44, Compiled Statutes, 1893. First point of the syllabus in *Richardson v. Campbell*, 34 Neb., 181, overruled.
6. **Contracts: JUDGMENTS: RATE OF INTEREST.** Said section 3 construed and *held*, (1) that where parties to a contract for the payment of money have not agreed upon any rate of interest or agreed upon a rate less than seven per cent, the judgment based on such contract draws interest at the rate of seven per cent per annum from the date of its rendition; (2) that where the parties to a contract for the payment of money have agreed upon a rate of interest lawful, greater than seven per cent, the judgment based on such contract will draw the contract rate of interest.

APPEAL from the district court of Douglas county.
Heard below before FERGUSON, J.

George W. Shields, for appellant, cited: *Cockle Separator Mfg. Co. v. Clark*, 23 Neb., 702; *Arnold v. Badger Lumber Co.*, 36 Neb., 841; *Hapgood v. Ellis*, 11 Neb., 131; *Burge v. Gandy*, 41 Neb., 149.

Wharton & Baird, *contra*, cited: *Johnson v. Missouri P. R. Co.*, 18 Neb., 690; *School District v. Caldwell*, 16 Neb., 68; *Van Sant v. Butler*, 19 Neb., 351; *Bell v. White Lake Lumber Co.*, 21 Neb., 525; *Dillon v. Russell*, 5 Neb., 484.

Mahoney, *Minahan & Smyth*, *McClanahan & Halligan*, *John P. Breen*, *William A. Redick*, and *Howard B. Smith*, also for appellees.

RAGAN, C.

William F. Havemeyer and W. F. R. Mills (the latter as receiver of the Hamilton Loan & Trust Company) brought this suit in equity in the district court of Douglas county, making William J. Paul, the Phenix Loan Association, George J. Paul, Fred Reumping, the Midland State Bank, George B. Christie, George L. Green, William D. Mead, Jr., and a large number of other persons whose connection with this case is immaterial here, parties defendant. Said William J. Paul had executed two mortgages to the Hamilton Loan & Trust Company, and it had assigned one of said mortgages to Havemeyer. The suit was brought to foreclose these two mortgages. The record does not disclose, nor is the inquiry material here, why or upon what theory Havemeyer and the receiver of the loan and trust company brought this action jointly. The action was brought on the 8th day of January, 1894, and a summons was issued for all the parties made defendants. This

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summons was returned on the 13th of January duly served on George J. Paul, the Midland State Bank, and Fred Reumping only. None of the other above mentioned parties made defendants to the action, so far as the record shows, were ever served with process. The answer day fixed by the summons was February 12, 1894. On the 8th of February, 1894, George J. Paul filed his answer to the petition of Havemeyer and Mills, traversing its averments, and setting out that he was the owner of the the mortgaged premises, having become such at a date subsequent to the date of the mortgages being foreclosed. On the 30th of January, 1894, the Midland State Bank filed its answer and cross-petition claiming a lien upon the mortgaged premises. On the 15th of March, 1894, by leave of the court, but without any notice thereof ever having been served upon or given to George J. Paul, Havemeyer filed a supplemental petition in the action, setting out that since the bringing of the suit, in order to protect his mortgage lien he had paid out \$222.77 as insurance premiums on the mortgaged premises, and prayed that he might be given a lien for said sum and interest against the mortgaged property. On the 24th of April W. D. Mead, Jr., filed an answer and a cross-petition claiming a lien upon said mortgaged property. On the 25th of April George L. Green filed an answer and a cross-petition claiming a lien. On the 27th of April George B. Christie filed an answer and a cross-petition claiming a lien against said property. And on the 16th of June the Phenix Loan Association filed an answer and a cross-petition claiming a lien against said mortgaged property. It is to be observed that these last four answers and cross-petitions were filed after the answer day and without notice to George J. Paul or the other parties to the suit. The record does not disclose that George J. Paul ever appeared in the case, either personally or by counsel, after the filing of his answer on February 8 until after the decree. The answer of Fred Reumping, if in-

deed he ever filed one, does not appear in the record. On the 27th and 28th days of June, 1894, the court heard the evidence in the case, Havemeyer, Mills, the Midland State Bank, Mead, Jr., Green, Christie, and the Phenix Loan Association appearing. George J. Paul did not appear on the trial, either in person or by attorney. On the 30th day of June, 1894, the court made the following findings: (1) That there was due Havemeyer on his mortgage bond and coupons, and for insurance paid since the bringing of the suit, \$37,415.92, and that he had a first lien upon the mortgaged property; (2) that there was due Mills, receiver, on his mortgage \$1,104.24, which was a second lien upon the mortgaged property; (3) that there was due the Phenix Loan Association on the bonds and mortgages set out in its answer \$12,420.30, which was a third lien upon the mortgaged property; (4) that there was due Fred Reumping on the judgment set out in his answer and cross-petition \$496, which was a fourth lien; (5) that there was due William D. Mead, Jr., on the judgment set out in his answer and cross-petition \$2,184.24, with seven per cent interest thereon from December 29, 1890, and costs, taxed at \$333.16, which was a fifth lien on the premises; (6) that there was due the Midland State Bank on the judgment set out in its answer and cross-petition \$419.80, with interest thereon at ten per cent per annum from January 6, 1891, which was a sixth lien on the premises; (7) that there was due G. L. Green on the judgment set out in his answer and cross-petition \$65, with interest at seven per cent per annum from May 11, 1891, which was a seventh lien; (8) that there was due George B. Christie on the judgment set out in his answer and cross-petition \$2,013.33, which was an eighth lien. The decree provided that unless the said sums found due should be paid within twenty days that the mortgaged premises should be sold and the amounts found due paid out of the proceeds of said sale. To reverse this decree George J. Paul has appealed.

1. The first complaint of the appellant relates to the action of the court in including in the amount found due Havemeyer the amount alleged by him to have been paid for insuring the mortgaged property after the bringing of the suit. Section 149 of the Code of Civil Procedure provides: "Either party may be allowed, on notice, and on such terms as to costs as the court may prescribe, to file a supplemental petition, answer, or reply, alleging facts material to the case, occurring after the former petition, answer, or reply." The claim of Havemeyer for payments made for insurance on the mortgaged property after the bringing of this action was a separate and independent cause of action and one that arose subsequent to the bringing of this suit, and was properly presented to the court by a supplemental petition. But we are of the opinion that the learned judge erred in permitting Havemeyer to file this supplemental petition without notice thereof to George J. Paul and other parties to the action who would be affected thereby. Paul, having been duly served with summons, was bound to take notice of any reply to such answer which Havemeyer might make, but he was not compelled to take notice of the supplemental petition filed in the case by Havemeyer. If the record disclosed that Paul was present in court and consented to the filing of this supplemental petition, that would of course be a waiver of his right to insist upon a formal notice thereof, but the record contains no such disclosure. If it appeared from the record that Paul appeared either in person or by counsel and participated in the trial of the case, perhaps he could not now be heard to complain of his want of notice of the filing of such supplemental petition. But as already stated the record does not show that Paul, either in person or by attorney, was present or participated in the trial of the case. So far as the record shows, Paul had no knowledge whatever of the existence of the supplemental petition in question until after the rendition of the decree appealed from. By the

summons served upon Paul he was notified that he had been sued by Havemeyer and that he was required to appear and answer his petition by the 12th of February. He appeared and he answered; and he had a right to presume that the court would render no other or different decree in favor of Havemeyer than that prayed for by him in his original petition. If a cause of action accrued to Havemeyer against the mortgaged property subsequent to the date of the filing of his petition, and if he desired a judgment or decree on such cause of action, he pursued the proper course in presenting the matter to the court by a supplemental petition. But Paul, without notice of the filing of such supplemental petition, or without some act of his by which he waived such notice, is no more concluded and bound by the judgment rendered thereon than he would have been by the decree rendered in favor of Havemeyer on his original petition, had such decree been rendered against the property without any summons having been served on him. Paul was not bound to take notice of the filing of the supplemental petition of Havemeyer because of the fact that he had been served with a summons in the original action and had appeared and answered. He was no more bound to take notice of the supplemental petition than if he had not answered; and it will scarcely be questioned that Paul, had he not appeared in the action, though duly served with summons, would not have been bound by the decree which the court rendered on the supplemental petition of Havemeyer, in the absence of all notice thereof. By the filing of the supplemental petition Havemeyer, in effect, brought another suit against the mortgaged property and all the parties to the original action; and it is only because the cause of action set out in the supplemental petition was connected with and grew out of the subject-matter on which the original foreclosure suit was based that Havemeyer could present to the court for adjudication such cause of action by supplemental pleadings. But this decree in favor

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of Havemeyer is erroneous for another reason. As already stated, the amount of the lien given Havemeyer was \$37,415.92. It appears from the evidence in the bill of exceptions that all of this decree, except \$224.92, was made up of amounts due Havemeyer from William J. Paul on certain bonds and coupons, but \$224.92 of the decree is for money which Havemeyer alleged in his supplemental petition he had paid out as premiums for insurance on the mortgaged property after the bringing of his foreclosure suit. There is no evidence in the bill of exceptions which shows, or tends to show, that Havemeyer, or any one for him, had paid out any sum of money whatever for insuring the mortgaged property after the bringing of the suit. The solicitor for Havemeyer testified on the hearing that he had made a computation of the amount due his client up to the first day of the term of court at which the decree was rendered, and that the amount was \$37,415.92, that that amount included \$224.77 of insurance paid, and interest thereon of \$2.15; and this is all the evidence in the record on the subject to support the decree rendered in favor of Havemeyer on his supplemental petition. It is hardly necessary to remark it is insufficient.

2. After February 12, 1894, the answer day fixed by the summons issued in the case and served on George J. Paul, to-wit, on April 24, 25, 27, and June 16, Mead, Jr., Green, Christie, and the Phenix Loan Association, respectively, on said dates, without ever having been served with process in the case, some of them by leave of court and others without such leave, filed their answers in the nature of cross-petitions claiming liens upon the mortgaged premises, and were by the decree of the court awarded liens against said property as already stated. The next complaint of the appellant is directed against the decrees awarded said last four named parties. Appellant's contention is that the decrees are erroneous as against him because the answers or cross-petitions of said parties were filed out of time

without any notice to him. It is to be remembered in this connection that George J. Paul was duly served with summons, and before the answer day fixed thereby filed his answer to the petition of Havemeyer and Mills, the plaintiffs below; that aside from this the record discloses no appearance at any time in the action by Paul, either in person or by attorney. The answers of Mead and others were in effect suits against Paul and the mortgaged property brought for the purpose of establishing certain liens against said property. Was Paul bound to take notice of the answers filed by his co-defendants Mead, Green, Christie, and the Phenix Loan Association because of the fact that he, Paul, had been duly served with process in the action and had appeared and answered the petition of the plaintiffs? We think not. If this suit had been brought under the old chancery practice prevailing before the adoption of the Code, and Mead and others had been made defendants to the action of Havemeyer and Mills and served with process in that action, before Mead and others would have been allowed to file their cross-petitions or cross-bills for affirmative relief, they would have been first required to answer the bills or petitions of Havemeyer and Mills; and to their cross-petitions or cross-bills they would have been compelled to make Havemeyer and Mills, the plaintiffs in the original action, and all the defendants in such original action, defendants, and notified them of the filing of such cross-petitions or cross-bills by the process of the court in the nature of a summons. The Code has changed this practice, but it has not abolished the principle that a party is entitled to notice of judicial proceedings instituted against him or his property.

In *Hapgood v. Ellis*, 11 Neb., 131, it was held: "In a foreclosure suit where several parties are made defendants as lien-holders, subsequent purchasers, or lessees of the mortgaged premises, their several answers claiming rights as such lien-holders, subsequent purchasers, or lessees may

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be regarded also as cross-petitions for relief as against their respective co-defendants as well as against the plaintiff; and any such defendant, regularly served with process, who fails to answer any material allegation contained in the answer of his co-defendant is bound thereby as well as by the decree founded thereon, and unless he appeals therefrom the same becomes as to him *res adjudicata*." But an examination of that case leads us to the conclusion that the learned judge who wrote the opinion meant no more than this: That the defendant to an action duly served with process therein is bound by or charged with notice of the averments of the answer of his co-defendant who had answered within the time fixed by law.

In *Cockle Separator Mfg. Co. v. Clark*, 23 Neb., 702, the rule was thus stated: "While all parties to an action are bound to take notice of pleadings properly filed within the time required by law, yet where a party in default obtains leave of court to file a pleading affecting other parties, the parties so affected should be notified of the filing of such pleading."

Carlow v. Aultman, 28 Neb., 672, was a suit brought by one Curtis against Carlow to foreclose a mortgage. Aultman & Co. was made a party defendant and service obtained upon it by publication and the answer day fixed for May 17. Carlow was personally served with a summons, and the answer day for him fixed on May 10. On the 17th of May, Aultman & Co. appeared and filed its answer in the nature of a cross-bill, asking for affirmative relief against Carlow. It was urged in this court that the judgment or decree pronounced in favor of Aultman & Co. against Carlow was erroneous because no notice of the filing of its cross petition by Aultman & Co. was given to Carlow, but the court, speaking through the present chief justice, said: "When a defendant in an action files his answer and cross-petition within the time fixed by law, he is not required to give to the other parties to the suit any notice of the filing of such pleading."

Arnold v. Badger Lumber Co., 36 Neb., 841, was an action brought by the lumber company to foreclose a mechanic's lien. Arnold, the owner of the real estate, was made a defendant and duly served with summons. The answer day, as fixed by the summons, was April 22. A number of other persons were made defendants to this action, who were also served with summons at the same time that Arnold was, and the time fixed for them to answer was the same. Arnold made no appearance to the action, and a decree was rendered against her by default. After the 22d of April, the answer day, a number of the co-defendants of Arnold, by leave of court or otherwise, filed answers in the nature of cross-petitions in the action, claiming liens against the property of Arnold, and were by the court awarded liens as prayed. On appeal from this decree by Arnold the court said: "After answer day, if a defendant files a pleading, in the nature of a cross-petition, against his co-defendants who have not appeared in the action, such co-defendants can be concluded in respect thereto only by their appearance, or after the service on them of a notice in the nature of a summons, as to such pleading."

These authorities then established this rule: That a party made defendant to an action and duly served with process is charged with notice of whatever answer any of his co-defendants may file in the action only when such answer is filed by such co-defendant within the time required by law. If Mead and others had been served with the summons that was served upon Paul, and had filed their answers on or before February 12, or if, on or prior to that date, they had obtained from the court an order extending the time for them to file their answers and had filed them within the time given, then doubtless Paul would have been charged with notice of the averments in such answers. If Mead and others had been served with notice of this suit by publication and had filed their answers

within the time fixed therefor by the publication notice, or on or prior to the expiration of that time had obtained an extension of time in which to answer, and had answered within such extension, then doubtless Paul would have been charged with notice of the averments of their answers. If the record disclosed that Paul or his counsel consented to the filing of these answers of Mead and others, then of course such consent would amount to a waiver of a formal notice thereof, but the record contains no such disclosure. If it appeared from the record that Paul, either in person or by counsel, had appeared and participated in the trial of the case, it may be that such appearance and participation would estop him from insisting that the decrees rendered against him and his property in favor of Mead and others were erroneous, because the answers and cross-petitions on which they were based were filed out of time and without notice to him, but no such fact appears in the record.

3. The next complaint which we notice is that the decree pronounced in favor of Fred Reumping is not sustained by sufficient evidence. The decree of the district court is as follows: "The court further finds that there is due the defendant Fred Reumping on his judgment described in his answer and cross-petition the sum of \$496, and interest thereon from December 4, 1890, at the rate of ten per cent per annum, and the costs of suit, for which the said Reumping is entitled to a valid fourth lien on said premises from December 27, 1890." As already stated, the answer and cross-petition of Reumping, if one was ever filed, is not in the record. The evidence in the bill of exceptions to support this decree is as follows: "James H. Adams offered proof on the claim of Fred Reumping." The court: "What is the amount due Mr. Adams?" Mr. Adams: "\$496; interest ten per cent from December 4, 1890, and it is a lien from December 27, 1890, the date of the filing of the transcript. This is the judgment of Fred Reumping." Then follows: "P. 72," referring to page 72 of the bill of exceptions, which is as follows:

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"Execution Docket 1, page 258.

Parties.	Date of Judgment.	Amt. Received.	Amt. of Costs.	Total Amt. of Judgment, Int. & Costs.
Fred Reumping	County Court	\$496.20	\$3.15	—
v.	Douglas Co.		.75 Inc. L. C.	—
William J. Paul.	Dec. 4, 1890.		.50 file pd.	—
	Interest 10 %.		.10 "	—
			2.00 Ex. & ret.	—

"1890, Dec. 27. Filed transcript. Filed præcipe for execution. Issued execution.

"June 17. Execution returned indorsed as follows, to-wit:

"Received this writ December 27, 1890, and, not being able to find any property of the within named defendant in Douglas county on which to levy, the same is returned wholly unsatisfied.

JOHN F. BOYD, *Sheriff*,

"By HENRY GREBE, *Deputy*.

"Fees, \$1.10.

"Execution Docket 1, page 258."

It would seem that Reumping owned a judgment against William J. Paul and he claimed that such judgment was a lien upon the real estate in controversy in this action. If we assume that he filed an answer, as the decree of the district court indicates, setting out this judgment, the evidence offered in his behalf did not prove the averments of his cross-petition or answer. (*Burge v. Gandy*, 41 Neb., 149; *Morrison v. Boggs*, 44 Neb., 248.) A judicial record of this state may be proved by the producing of the original, or by a copy thereof, certified by the clerk or the person having the legal custody thereof, authenticated by his seal of office, if he have one. (Code of Civil Procedure, sec. 413.)

4. Havemeyer's original petition was based on a real estate mortgage bond due five years from date, drawing interest at the rate of six per cent per annum, payable semi-annually, until maturity, and ten per cent per annum, payable semi-annually, after maturity. The district court

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awarded Havemeyer interest on the decree rendered on this bond at seven per cent per annum from the first day of the term of court at which the decree was rendered. The appellant assails the correctness of this decree in this respect, his contention being that interest should have been awarded Havemeyer on this decree at the rate of six per cent only. By the law in force on the subject of interest prior to the act of June 1, 1879, the present law, the highest legal contract rate of interest was twelve per cent per annum; and where no rate of interest was fixed by the contract, it drew ten per cent per annum; and judgments and decrees for the payment of money from the date of the rendition thereof drew interest at the rate of ten per cent. (See General Statutes, 1873, ch. 34.)

Gregory v. Hartley, 6 Neb., 356, was decided under the old statute. In that case the note appears to have drawn interest at the rate of seven per cent per annum, payable semi-annually, until maturity, and ten per cent thereafter. The district court by its decree awarded the plaintiff below interest thereon at the rate of twelve per cent, and on error proceedings to this court the decree was reversed, the court holding that there was no authority under the statute to render a decree drawing twelve per cent interest, except in cases where the debt upon which the decree was predicated was drawing that rate of interest. But the court did not decide, so far as the recorded opinion shows, what rate of interest the district court should have awarded the complainant in the decree.

In *Weyrich v. Hobelman*, 14 Neb., 432, the note drew interest at ten per cent per annum from date until maturity, and contained a provision that if not paid at maturity it should draw interest at twenty-four per cent per annum thereafter. The court construed the provision for twenty-four per cent per annum from maturity as a penalty, and held that the holder of the note was entitled to a judgment for the face of his note with interest thereon at the rate of

ten per cent per annum. The question raised and argued in the case seems to have been whether the note was usurious, whether the holder of the note was entitled to a judgment for the face of his note with ten per cent interest from its date until payment; and whether he was entitled to have such judgment draw interest at the rate of ten per cent per annum from its rendition is not decided in the case, although such seems to be the fair inference.

In *Kellogg v. Lavender*, 15 Neb., 256, the note drew interest at the rate of twelve per cent per annum from date. The district court gave the holder of the note interest at twelve per cent from its date to maturity; from maturity to June 1, 1879, the date of the taking effect of the present interest law, ten per cent; and from June 1, 1879, seven per cent. On appeal this court modified the decree of the district court and gave the holder of the note interest thereon at the rate of twelve per cent per annum from the date of the note to the date of the decree. What rate of interest the decree should draw does not appear to have been made a question in the case, nor is any opinion expressed by the court as to what rate of interest the decree should draw.

In *Hager v. Blake*, 16 Neb., 12, the note drew interest at the rate of twelve per cent per annum from date until paid, and contained a provision that overdue interest should draw interest. The question presented by the case was whether the provision for compound interest made the note usurious. The court, after disposing of that question by holding that such provision did not render the contract usurious, cites *Kellogg v. Lavender*, 15 Neb., 256, as an authority for the proposition that the contract rate mentioned in the note continues until the payment thereof, and said: "The rate of interest agreed upon in a written contract, not in excess of that allowed by statute, continues until payment."

In *Upton v. O'Donahue*, 32 Neb., 565, a case decided

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under the present interest law, the note drew interest at the rate of six per cent per annum, payable semi-annually, until maturity, and ten per cent after maturity. The court held that the agreement to pay interest at ten per cent per annum after the maturity of the note was in the nature of a penalty and did not increase the rate of interest previously agreed upon by the parties, again citing *Weyrich v. Hobelman*, 14 Neb., 432. The decree was reversed and the cause remanded to the district court with instructions to enter a decree for the amount of the note and six per cent interest thereon.

In *Richardson v. Campbell*, 34 Neb., 181, the construction of the present interest law was again before the court, and in the first point of the syllabus it is said: "Where money has been loaned at a specific rate of interest, as ten per cent, and the note contains a provision that if not paid at maturity the maker shall pay twelve per cent thereafter, the higher rate is in the nature of a penalty and the contract rate will continue as before the maturity of the note." This last case lays down the rule that where a note draws interest at six per cent per annum from date to maturity and a higher lawful rate of interest afterwards, the higher rate is to be regarded as a penalty and not enforceable, and that the rate which the note drew from its date to maturity is to be regarded as the contract rate fixed by the parties. It is to be observed that the rule here announced is predicated on *Weyrich v. Hobelman*, 14 Neb., 433, but in that case the rate of interest which the note drew after maturity was twenty-four per cent, or an unlawful rate, while in *Richardson v. Campbell*, *supra*, the rate of interest after maturity was a lawful one. It may be that if a promissory note provides for the payment of an unlawful rate of interest after its maturity the courts would regard such unlawful rate of interest as a penalty and refuse to enforce it, but no reason exists for refusing to enforce the lawful contracts of parties in the absence of fraud, mistake, or their being

unconscionable. We think, therefore, that the rule as laid down in the first point of the syllabus of *Richardson v. Campbell, supra*, is too broad, and that the correct rule is this: Where a note provides for a lawful rate of interest from date to maturity and a higher and lawful rate of interest afterwards, that the rate of interest which the note draws from its date to maturity and the rate which the note draws after maturity are both the contract rates of the parties, and since they are lawful, are enforceable.

Section 3, chapter 44, Compiled Statutes, 1893, provides, in substance, that all decrees and judgments for the payment of money shall draw interest at the rate of seven per cent per annum from the date of the rendition thereof until paid, but if such judgment or decree is founded upon a contract, by the terms of which a greater rate of lawful interest shall have been agreed upon, then such judgment or decree shall draw the same rate of interest which the contract on which such judgment or decree is based drew. In the case under consideration, as already stated, the bond drew interest at the rate of six per cent per annum from date until maturity and ten per cent after maturity. We conclude that the contract rate between the parties to the bond was six per cent per annum to its maturity and ten per cent thereafter, and that the decree rendered thereon should draw interest at the rate of ten per cent. The construction placed on said section 3 by the court is: Where parties to a contract for the payment of money have not contracted for any rate of interest, or contracted for a rate less than seven per cent per annum, a judgment based on such contract will draw interest at the rate of seven per cent per annum from the date of its rendition. Where the parties to a contract for the payment of money have agreed upon a rate of interest lawful greater than seven per cent per annum, the judgment based on such contract will draw the contract rate of interest. The precise question is this: What rate of interest does a judgment draw based on a

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contract for the payment of money which by its terms draws less than seven per cent per annum? This question has never been presented to nor passed upon by this court. The opinion of the writer is that where parties to a contract for the payment of money have agreed upon a rate of interest lawful, and such contract is reduced to judgment, the judgment should bear the same rate of interest which the contract drew, for the reason that though the contract is merged in the judgment, still a judgment is not the making of a new contract for the parties, but one step which the law takes to carry out the contract made. The district court did not err as against the mortgagor in allowing Havemeyer interest at seven per cent per annum on the decree rendered in his favor on the mortgage bond.

For the other errors mentioned the entire decree is reversed and the cause remanded to the district court for further proceedings, and with instructions to tax the entire costs of this case, including the costs of this appeal, to Havemeyer, Mead, Jr., Green, Christie, Phenix Loan Association, and Reumping, in such proportions as the court may deem just, and to require each of said parties to pay the amount of costs taxed against him as a condition precedent to such party's right to be further heard in this case.

REVERSED AND REMANDED.

KEARNEY ELECTRIC COMPANY V. BRIDGET LAUGHLIN,
ADMINISTRATRIX.

FILED JUNE 18, 1895. No. 6431.

1. **Death by Wrongful Act:** ACTION FOR DAMAGES: PARTY PLAINTIFF: SUFFICIENCY OF PETITION: CONSTRUCTION OF STATUTE. A widow, as administratrix, sued a corporation for negligently causing the death of her husband. The action was

based on chapter 21, Compiled Statutes, 1893. The petition alleged that the deceased left seven minor children, the oldest thirteen years and the youngest five months of age, "wholly dependent" on the deceased "for their support and maintenance." *Held*, (1) That the petition was not open to the objection that it did not aver facts showing that the persons for whose benefit the suit was brought had, by reason of the death of the intestate, sustained pecuniary injuries within the meaning of said statute; (2) that the words "support and maintenance," as used in the petition, meant food, clothing, and shelter; and the words "wholly dependent" implied that the deceased was the person, and the only person, whose legal and moral duty it was, and to whom the children looked, and upon whom they relied, to furnish the necessaries of life; (3) that it is not absolutely necessary that a petition based on this statute should contain the words, "damage, injury, or loss." It is sufficient in that respect if it appears from the averments of the petition that by reason of the death of the intestate a pecuniary loss, injury, or damage has resulted to the wife and next of kin of the deceased.

2. ———: CONSTRUCTION OF STATUTE. Such an action as the one at bar was unknown to the common law, and is purely a creature of statute; but solely because of that the courts will not give the statute a technical or narrow construction.
3. ———: ———. Whether the rule of the common law, that statutes in derogation thereof are to be strictly construed, is in force in this state, doubted.
4. ———: NEGLIGENCE: EVIDENCE. The intestate was killed by the caving in of the earth while driving a tunnel for the corporation. The evidence, set out at length in the opinion, examined, and *held* to support the finding of the jury that the negligence of the corporation was the proximate cause of the death of the intestate.
5. Master and Servant: RISK OF EMPLOYMENT: DEFECTIVE MACHINERY. The rule that a servant by his contract of employment assumes the ordinary risks and dangers incident thereto cannot be successfully invoked as a defense by a master, unless he shows that the machinery, tools, and appliances furnished by him to the servant were reasonably safe and fit for the performance of the work in hand, and which the servant in the execution of his work, by the exercise of ordinary care on his part, might use with reasonable safety to himself; and that the appliances, machinery, or tools, which caused the injury to the servant, were, when used by him, obviously defective and dangerous. (*Missouri P. R. Co. v. Baxter*, 42 Neb., 793.)

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6. Review: RULINGS ON EVIDENCE: ASSIGNMENTS OF ERROR.

Under an assignment that the court erred in admitting or rejecting evidence this court cannot review anything. Under an assignment that the court erred in admitting the evidence of a named witness, if the record shows that any part of the evidence of such witness was properly received, the assignment will be overruled.

7. Master and Servant: NEGLIGENCE: INSTRUCTIONS. On the trial, the court instructed the jury as follows: "You are to determine from all the facts and circumstances, as shown by the evidence, whether the deceased was exposed to unusual or extraordinary danger in digging the tunnel; and if you find that he was, this would be negligence on the defendant's part and the plaintiff could recover," etc. *Held*, (1) That the court might have properly told the jury that if the deceased, by working in the tunnel at the time and in the manner and under the circumstances that he did, was thereby exposed to unusual or extraordinary danger without knowing it and without opportunity to know it, that that fact was evidence of negligence on the part of the company; but it was not for the court to say that the fact rendered the company guilty of negligence; whether it did was for the jury; (2) that the giving of the instruction was reversible error.

8. ———: ———: ———. On the trial the district court instructed the jury as follows: "If the danger was unusual and not incident to the employment, and the employe had no knowledge of the unusual danger, and could not with ordinary care and prudence have discovered it, he would not be deemed to have consented to incur such unusual risk." *Held*, That the instruction was correct.

ERROR from the district court of Buffalo county. Tried below before HOLCOMB, J.

The facts are stated by the commissioner.

Marston & Nevius, for plaintiff in error:

The petition does not state a cause of action. (*Hurst v. Detroit City R. Co.*, 84 Mich., 539; *Perry v. Georgia Railroad & Banking Co.*, 11 S. E. Rep. [Ga.], 605; *Smith v. East and West R. Co.*, 10 S. E. Rep. [Ga.], 602; *Pennsylvania R. Co. v. Lilly*, 73 Ind., 254; *Gilligan v. New York*

& *H. R. Co.*, 1 E. D. Smith [N. Y.], 453; *Baldwin v. Western Railroad Corporation*, 4 Gray [Mass.], 333; *Tomilson v. Derby*, 43 Conn., 562; *Taylor v. Monroe*, 43 Conn., 42; *Dunn v. Cass Avenue Street R. Co.*, 21 Mo. App., 205; *Matthews v. Missouri P. R. Co.*, 26 Mo. App., 84.)

In support of the contention that there was not sufficient evidence to support the verdict and none to show negligence on part of plaintiff in error, counsel cited the following authorities: *Wood, Master & Servant*, sec. 382; *Rasmussen v. Chicago, R. I. & P. R. Co.*, 21 N. W. Rep. [Ia.], 583; *Olson v. McMullen*, 24 N. W. Rep. [Minn.], 318; *Peterson v. City of Rushford*, 42 N. W. Rep. [Minn.], 1063; *Songstad v. Burlington, C. R. & N. R. Co.*, 41 N. W. Rep. [Dak.], 755; *Simmons v. Chicago & T. R. Co.*, 110 Ill., 340; *Naylor v. Chicago & N. W. R. Co.*, 53 Wis., 661; *Leonard v. Collins*, 70 N. Y., 90; *District of Columbia v. McElligott*, 117 U. S., 621; *Tuttle v. Detroit, G. H. & M. R. Co.*, 122 U. S., 189; *Griffin v. Ohio & M. R. Co.*, 24 N. E. Rep. [Ind.], 888.

There was error in the instructions of the court. (*City of Plattsmouth v. Mitchell*, 20 Neb., 228; *Stevens v. Howe*, 28 Neb., 547; *Johnson v. Missouri P. R. Co.*, 18 Neb., 690; *Village of Orleans v. Peny*, 24 Neb., 831; *Gravelle v. Minneapolis & St. L. R. Co.*, 11 Fed. Rep., 569; *Wolcott v. Studebaker*, 34 Fed. Rep., 8; *Anderson v. Winston*, 31 Fed. Rep., 528; *Quincy v. Kitts*, 3 N. W. Rep. [Mich.], 240; *Pittsburgh, C. & St. L. R. Co. v. Adams*, 5 N. E. Rep. [Ind.], 187; *Reese v. Biddle*, 3 Atl. Rep. [Pa.], 813.)

Oldham & Murphy, contra.

RAGAN, C.

Bridget Laughlin, as administratrix of the estate of Daniel Laughlin, deceased, sued the Kearney Electric Company (hereinafter called the "company") in the district court of Buffalo county for negligently, as she alleges,

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causing the death of her intestate and husband. The administratrix had a verdict and judgment, and the company, to reverse said judgment, has prosecuted to this court a petition in error, assigning the following errors:

1. That the petition of the administratrix does not state a cause of action. The petition, among other things, contained the following averments: "That the deceased, Daniel Laughlin, died intestate and left surviving him as heirs of his estate and his next of kin the plaintiff, who was his wife, and the following named minor children, namely, Nora, age thirteen years; May, age twelve years; Kate, age ten years; Margaret, age eight years; James, age six years; Daniel, age five years; Michael, age three years; and Samuel, age five months; that the plaintiff and above named children were wholly dependent on the said Daniel Laughlin for their support and maintenance." This assignment is predicated upon the contention that there is no allegation in the petition that the widow or her children have suffered any pecuniary damage by reason of the death of the intestate. This action is brought under chapter 21, Compiled Statutes, 1893, which provides:

"Sec. 1. That whenever the death of a person shall be caused by the wrongful act, neglect, or default, and the act, neglect, or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who, or company or corporation which would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony.

"Sec. 2. That every such action shall be brought by and in the names of the personal representatives of such deceased person, and the amount recovered in every such action shall be for the exclusive benefit of the widow and next of kin of

such deceased person, and shall be distributed to such widow and next of kin in the proportion provided by law in relation to the distribution of personal property left by persons dying intestate; and in every such action the jury may give such damages as they shall deem a fair and just compensation, with reference to the pecuniary injuries resulting from such death, to the wife and next of kin of such deceased person, not exceeding the sum of five thousand dollars; *Provided*, That every such action shall be commenced within two years after the death of such person."

It is not doubted that the petition based on this statute must aver facts showing that the persons for whose benefit the action was brought have, by reason of the death of the intestate, sustained pecuniary loss, injury, and damages. Such an action as the one at bar was unknown to the common law. It is purely a statutory action; but solely because of that the courts will not give it a technical or narrow construction. Indeed, it is doubtful whether the rule of the common law, that statutes in derogation thereof are to be strictly construed, is in force in this state. The courts are prohibited by positive statute from applying such rule to any of the provisions of the Code of Civil Procedure. (See sec. 1, Code of Civil Procedure.) The petition assailed alleges that the widow and administratrix and her minor children were wholly dependent upon the deceased for support and maintenance. "Support and maintenance," as here used, mean food, clothing, and shelter. The words "wholly dependent," as here used, fairly imply that the deceased was the person, and the only person, whose legal and moral duty it was, to whom they looked and upon whom they relied, to furnish the necessities of life; and the result of the decease of this man was to inflict upon his widow and minor children a pecuniary loss. A pleader should state the facts which constitute his cause of action or defense; but it is not absolutely necessary in such an action as the one at bar that the petition should contain the words "dam-

age, injury, or loss." It is sufficient in that respect if it appear from the petition that by reason of the death of the intestate that a pecuniary loss has resulted to the wife and next of kin of the deceased. We have examined the cases cited by counsel for the company in support of his contention that the petition in this action does not state a cause of action. Some of these authorities we do not regard as being in point, and others, if in point, we are not disposed to follow. The case of *Hurst v. Detroit City R. Co.*, 48 N. W. Rep. [Mich.], 44, cited by counsel to support his argument, was a suit brought by a father as administrator of his deceased child, a year and eleven months old, under a statute similar in its terms to the one quoted above. The petition alleged that the Detroit City railway had negligently caused the death of the child. The court said: "No proof was made by the plaintiff of any pecuniary loss, and there is no such allegation in the declaration." It will thus be seen that this case is not an authority for the contention of counsel for the company here. We think the petition assailed states a cause of action.

2. The second assignment is that the finding of the jury, that the negligence of the company was the proximate cause of the death of Laughlin, is not supported by sufficient evidence. The record contains no cut or drawing showing the situation and the place of the company's works where Laughlin was killed; but from the evidence it seems that on the day before the unfortunate casualty the situation of the company's works and the place where the casualty occurred were as follows:

not perpendicular, as Laughlin, prior to said date and preparatory to commencing driving the tunnel east from the line L, M, had cut or sloped off the wall, L, M, from the top of the proposed tunnel, R to S. It seems that the company was engaged at the city of Kearney, in this state, in the manufacture and sale of electricity for illuminating and power purposes, and had its power house located on or near the canal previously constructed from the Platte river to a point at or near the property of the company described above. Laughlin had been in the employ of the company for something over two years. He was familiar with the improvements made and being constructed. He had assisted in cutting the canal, E, F, M, L and H, O, N, G and in constructing part of the original tunnel, represented by P, P, N, O. One O'Brian, a civil engineer, was the general superintendent of the company, and the engineer who planned for the company the improvements made and under way. He had under him a man named Hanlon, who was a general foreman. There was a man named Cleary, also in the employ of the company, who was foreman of and in control of men while they were working on the canal and tunnel. Laughlin was not employed for any specific purpose, nor did he perform any particular work. He was subject at all times to the orders of O'Brian. When at work anywhere outside the canal or tunnel he seems to have been subject to the orders of Hanlon, and when at work in the tunnel or canal, under the direction of Cleary. On the afternoon of April 7 the two men, Cleary and Laughlin, began the work of driving the tunnel east from the line L, M. After excavating for a short distance, or forming the beginning or mouth of the tunnel, to prevent the earth composing the roof of the tunnel from caving or falling, they put a board or plank three inches thick and sixteen inches wide across the roof or mouth of the tunnel overhead and supported it by upright timbers. Cleary and Laughlin performed some little work that afternoon towards

the excavation. The next day Laughlin worked alone in the tunnel, and after he had driven it in several feet beyond the plank support, above mentioned, the tunnel above him "caved in," the earth fell on him, and he was killed. O'Brian, the superintendent, had laid out the plan for this work and given Cleary general directions as to how the tunnel should be supported while in process of construction. The superintendent was present when Cleary and Laughlin put in the supports at the mouth of the tunnel, or very soon afterwards, and approved the supports made and the way in which they were made. He directed Cleary to use the timbers which he and Laughlin did use, and instructed him how to construct the supports. The superintendent was in the tunnel the day Laughlin was killed while he was at work and again examined the supports. On the trial the superintendent testified as follows:

Q. It is not necessary to wall the top of your tunnel?

A. In our work I timbered every foot just as we went along with posts.

Q. You considered in order to make proper protection and to make it safe was to prop every foot?

A. I don't mean to prop every foot, but the timbers extended along the whole length.

Q. There should be some support on top of the tunnel all along in order to take proper precaution?

A. I will say, generally, that is the way we did it.

Q. You did it for the purpose of protecting the men and guarding against the caving in of the tunnel?

A. Yes, sir; and it might be to keep the shape of the tunnel. No great amount of earth can fall out of an arch in this country.

Q. The top of the tunnel had not been walled up?

A. No, sir.

In the last answer of this witness he is speaking of that part of the tunnel in which Laughlin met his death. In the former questions he is speaking about that part of the

tunnel represented by O, P, P, N, which had been constructed prior to the time Laughlin was killed. No person but Laughlin appears to have worked in the tunnel the day he was killed. Nor does the evidence show that the superintendent, or any one else, instructed Laughlin to build supports to the roof of the tunnel as fast as the driving proceeded; nor that the company, or any of its officers, took any steps looking to that end, although they knew that Laughlin was at work therein; and it is not claimed that any other support was ever placed in the tunnel where the accident happened than the one built by Laughlin and Cleary when the work was begun. We think that the failure of the company and its officers to give any instructions or to take any steps looking to the bracing and the propping of the roofs of this tunnel as the work of driving it proceeded was sufficient evidence of negligence on the part of the company to support the finding of the jury that such negligence was the proximate cause of Laughlin's death.

3. Another assignment is that the finding of the jury, that the negligence or contributory negligence of Laughlin was not the proximate cause of his death, is not supported by sufficient evidence. The facts have already been stated. While the act of Laughlin in driving or excavating the tunnel to a point several feet beyond the plank support that he and Cleary had put at the mouth of the tunnel, without first putting up other supports, was evidence of negligence on his part, yet it was for the jury to say from this evidence whether by digging and excavating beyond the support at the time and under the circumstances that he did he was thereby guilty of negligence.

It is said in argument here that Laughlin was not ordered to work in the tunnel; that he was there voluntarily; but this argument falls to the ground in the face of the evidence which shows that Laughlin was an employe of the company; that he worked wherever he was directed to

work, and was told that when he had nothing else to do that he might work in the tunnel. The superintendent of the company—the reading of whose evidence impresses one with the idea that he is not only a skillful engineer and a truthful witness, but also a gentleman imbued with the cultured instincts of humanity—testifies that Laughlin was a ready and willing servant; that he was always at work somewhere, could always find something to do; that he, the superintendent, was in the mouth of the tunnel a few hours before Laughlin was killed, examined the supports, thought they were sufficient, and he does not say nor pretend that he ever suggested to Laughlin or any one else the necessity of building any other support in the tunnel than the one there. The result shows that the engineer was mistaken as to the sufficiency of these supports. He had had years of experience in tunneling. We think that the jury made no mistake under all this evidence when it said in effect that Laughlin was not guilty of negligence by remaining in this tunnel and continuing this excavation, as he had a right to rely upon the vigilance, the knowledge, and the judgment of his superintendent; that if there was any probability of the earth caving, or any necessity for additional supports, the superintendent would have spoken. The superintendent did not speak. His silence perhaps was Laughlin's death warrant; and though his failure to speak was the result of honest mistake on his part, that mistake the jury rightfully charged to the master instead of the servant.

4. The next assignment is that the judgment is contrary to law. It is argued in support of this contention that the accident which caused Laughlin's death was one of the risks which he assumed by virtue of his employment; that the ordinary risks incident to constructing a tunnel is the caving in of the earth; that that was something which would probably happen, and that Laughlin was bound to know might happen; and that by continuing the work he

assumed the risk of injury to himself from such accident. In support of this contention counsel cite us to *Griffin v. Ohio & M. R. Co.*, 24 N. E. Rep. [Ind.], 888, in which it was held: "One who is employed to dig out gravel from under a thin stratum of clay cannot recover from his master for injuries received from the clay falling on him, since that is a danger incident to the business." Under the facts in that case we think it was correctly decided. Griffin was employed for the express purpose of digging out gravel overlaid with a thin stratum of clay. The master took no precautions whatever to support the clay after the gravel was removed. The danger of this clay falling was obvious and imminent to any man; and with this knowledge, without any protest or objection, or promise on the part of the master to provide a support for this clay, and without the master's taking any steps looking towards the building of supports for the clay, Griffin continued the excavation. By so doing he of course assumed the risk of the clay falling and injuring him. In *Missouri P. R. Co. v. Baxter*, 42 Neb., 793, the railway company employed Baxter to brake on one of its trains. He had previously been in the employ of another railroad company in the capacity of brakeman. At the time the Missouri Pacific Company employed Baxter it had taken no steps to block the frogs of its switches, nor did it take any such steps after employing Baxter, nor did it make him any promises that it would do so. Baxter was a full grown man and entered in the employ of the Missouri Pacific Company as brakeman and served it in that capacity for some months, passing twice per day on certain parts of its road on which the frogs of its switches were unblocked. He caught his foot in one of these frogs and was killed. It was held that since the danger of catching his foot in an unblocked frog was open, notorious, and obvious to him at the time he entered the service of the company and continued to be so all the time he was in its service, and that he continued in the service without pro-

test or objection or promise on the company's part to block its frogs, he must be deemed to have assumed that risk; and in said case it was held: "A servant, by his contract of employment, assumes the ordinary risks and dangers incident thereto. If the machinery, tools, or appliances furnished the servant by his master are obviously defective and dangerous, and the servant, notwithstanding, continues in the service, he thereby assumes the risks of any injury which he may sustain by reason of such defective appliances, unless he is induced to continue in such service by the promise of the master to remedy such defect." But the jury by its verdict has found that the supports for the roof of this tunnel furnished by the company were not reasonably safe and fit for the purposes for which they were designed; that the support did not afford Laughlin reasonable safety while executing with ordinary care the work of driving the tunnel; and the evidence supports this finding. Again, the evidence on behalf of the company, and especially that of its superintendent, is to the effect, not only that the support made in the tunnel was not obviously defective or imperfect, but that, in the opinion of the superintendent, it was amply sufficient and that it was skillfully and mechanically constructed. The rule then that a servant, by his contract of employment, assumes the ordinary risks and dangers incident thereto is not a defense to the company in this action. This rule can never be successfully invoked as a defense by a master unless he shows that the machinery, tools, or appliances furnished by him for the servant were reasonably safe and fit for the performance of the work in hand; and which the servant in the execution of his work, by the exercise of ordinary care on his part, might use with reasonable safety to himself; and that the appliances, machinery, or tools which caused the injury to the servant were, when used by the servant, obviously defective and dangerous. (*Sioux City & P. R. Co. v. Finlayson*, 16 Neb., 578; *Lee v. Smart*, 45 Neb., 318.)

5. Another assignment of error is that the damages awarded by the jury are excessive, appearing to have been given under the influence of passion and prejudice. We have failed to discover anything in this record that will support this assignment. The amount of the verdict is \$2,000. The deceased was a strong, healthy man, capable of earning, and earning at the time of his death, about \$10 per week. He was thirty-eight years of age, and left eight minor children and a widow wholly dependent upon him for support.

6. Another assignment is, "The court erred in admitting improper evidence on behalf of the plaintiff." The argument in the brief in support of this assignment is that the court erred in admitting the evidence of a witness named Mannix. We cannot review the assignment, for the reason that it is too indefinite. If a litigant is of the opinion that a court errs in admitting the evidence of any witness, he should object on the trial to the reception of the particular evidence, and specifically assign the ruling of the court in his petition in error here. Under an assignment that the court erred in admitting or rejecting evidence, this court cannot review anything. Under an assignment that the court erred in admitting the evidence of a named witness, if the record shows that any of the evidence of such witness was properly received, the assignment will be overruled.

7. The next assignment is that the court erred in giving upon its own motion the following instruction to the jury: "Negligence is the omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do." This is the definition of negligence given by the court in *Blyth v. Birmingham Water-Works Co.*, 11 Exch. [Eng.], 784, and approved in *Smith v. London & S. W. R. Co.*, 5 C. P. [Eng.], 102. In *Baltimore & P. R. Co. v.*

Jones, 95 U. S., 439, the supreme court of the United States defines "negligence" as follows: "Negligence may consist in either failing to do what, under the circumstances, a reasonable and prudent man would ordinarily have done, or in doing what he would not have done." The definition given by the district court in this case, and complained of, is substantially, with the exception that it does not contain the phrase "under the circumstances," the definition adopted by the highest court in this nation. The instruction of the district court was substantially correct; and even if we should be of the opinion that it was technically defective, we are still unable to say that the company was prejudiced by it.

8. The next assignment of error is that the court erred in giving instruction No. 7 of the instructions given by the court on its own motion. That instruction is as follows: "You are instructed that one who contracts to perform labor or render services for another takes upon himself those risks, and only such, as are usually incident to the employment engaged in; and the deceased in this case, when he engaged in digging the tunnel, assumed the ordinary risks and dangers only which are incident to such employment." We think this instruction correct in every respect.

9. The next assignment is that the court erred in giving on its own motion to the jury the following instruction: "Where the employer places one employe under the direction and control of another, and the latter, in the exercise of the authority so conferred, orders the former into a place of unusual danger, and thus exposes to extraordinary peril, of the existence and extent of which he is not advised, the employer would be liable in the event of injury to such employe." Counsel for the company admit that this instruction is correct as a proposition of law, but insists that there is no evidence upon which to base it. His contention is that Laughlin was not under the control or direction of any one while digging this tunnel. We have already

quoted the evidence, and we repeat that while the evidence does not disclose that any officer of the company ordered Laughlin to dig this tunnel, yet the evidence does show that he was in the employ of the company; that he did any kind of work that he was told to do; and that he was told by an officer of the company that when he was not busy at anything else that he might work in the tunnel. This was equivalent to a command to Laughlin that when not otherwise engaged he should put in his time in the tunnel; that he began the excavation of the tunnel with his foreman Cleary; that he was at work on the tunnel on the 8th of April when he was killed; that the superintendent of the company was there while he was at work; that he was neither ordered to desist, nor was any objection made by the company to his working at that particular work. In other words, the evidence is sufficient to show that Laughlin was excavating this tunnel in pursuance of his employment by the electric company, and that what he did in the tunnel he did under the advice and direction of the officers of the company. Under the facts and circumstances in evidence in the case the instruction complained of was correct.

10. The next assignment of error is that the court erred in giving to the jury instruction No. 10 of the instructions given on its own motion. The instruction is as follows: "You are to determine from all the facts and circumstances as shown by the evidence whether the deceased was exposed to unusual or extraordinary danger in digging the tunnel; and if you find that he was, this would be negligence on the defendant's part and the plaintiff could recover, unless you further believe that the deceased knew, or, in the exercise of ordinary care and prudence, might have known, that the danger was extraordinary or unusual, in which event a recovery could not be had." This instruction was erroneous. By it the court told the jury, in effect, that if Laughlin's presence in the tunnel, without his knowing it

or having opportunity of knowing it, exposed him to unusual danger, that that fact was negligence on the part of the company. It has been time and again decided by this court that it is for the presiding judge to say what acts or omissions are evidence of negligence, but that it is for the jury to say what conclusion such evidence warrants. The court might have properly told the jury that if Laughlin, by working in the tunnel at the time and in the manner and under the circumstances that he did, was thereby exposed to unusual or extraordinary danger, without knowing it and without opportunity to know it, that that fact was evidence of negligence on the part of the company; but it was not for the court to say that the fact rendered the company guilty of negligence, whether it did was for the jury. (See *Missouri P. R. Co. v. Baier*, 37 Neb., 235; *Omaha Street R. Co. v. Craig*, 39 Neb., 601; *Chicago, B. & Q. R. Co. v. Oleson*, 40 Neb., 889.)

11. The district court modified an instruction offered on the trial by the company and given by the court. The modification was as follows: "If the danger was unusual and not incident to the employment, and the employe had no knowledge of the unusual danger, and could not, with ordinary care and prudence, have discovered it, he would not be deemed to have consented to incur such unusual risk." To this modification counsel for the company took an exception; and the action of the court in thus modifying the instruction is the next assignment urged here. What we have already said in answer to the argument of counsel, that Laughlin, by working in the tunnel, assumed the risk of dangers incident thereto, must dispose of this assignment. We do not think the court erred in the modification complained of.

12. The next assignment is that the court erred in refusing to give the following instruction asked by the company: "If the negligence or carelessness of the deceased contributed directly to the injury which caused his death,

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the plaintiff cannot recover, and your verdict should be for the defendant." The court did not err in refusing to give this instruction, for the reason that the court, at the request of the company, had already instructed the jury as follows: "The deceased, Daniel Laughlin, was bound to exercise ordinary care for his personal safety while engaged in the excavation in question in this case; and if you believe from the evidence that his negligence or carelessness, if any, contributed directly to the injury which caused his death, then you will find for the defendant."

13. The final assignment of error is that the court erred in refusing to give to the jury an instruction in the following language: "Fellow-servants are persons employed and engaged in the same kind of work, for the same employer, and one servant cannot recover from the employer for an injury which resulted from the carelessness or neglect of a fellow-servant; and if the witness Cleary, and the deceased, in putting in the timber supports were doing so for the electric company, and after putting in such supports worked at the excavating, either together or separately, then you are instructed that they were fellow-servants; and if the caving of the earth resulted from the carelessness of either or both of them, in not properly supporting the bank, then the defendant would not be liable for the injury caused by such caving." We think the court correctly refused to give this instruction, for the reason that there was no evidence upon which to base it. It is true that the support put in the tunnel was put there by Cleary and Laughlin, but there was no evidence that the caving in of the earth which killed Laughlin resulted from the negligence of either Cleary or Laughlin or both of them in not properly supporting the tunnel. In other words, as already stated, the evidence shows that Cleary was the foreman of Laughlin; that they built the support in the tunnel of the timbers of which the superintendent directed it to be built; that Cleary and Laughlin constructed the support

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under the general direction of the superintendent; that he was present at the time it was constructed, or soon after, and approved of the manner in which it was constructed; and had Cleary himself been killed by the caving in of this tunnel as was Laughlin, the material of which the support was constructed, the manner of its construction, and the fact that Cleary built the support, would, under the circumstances, have been no evidence of negligence on his part. Again, the question of fellow-servant was not in this case. If it be conceded that Cleary and Laughlin were fellow-servants while working in this tunnel and building the supports for it, still there is no evidence to show that Laughlin's death was the result of the negligence of Cleary in constructing the supports at the time and in the manner and of the material that he did. If this material was improper or defective, if the support was insufficient, if it was not properly put up, the fault was that of the general superintendent under whose directions it was done.

For the error of the court in giving instruction No. 10 of the instructions given on his own motion, the judgment of the district court is reversed and the cause remanded.

REVERSED AND REMANDED.

S. L. TRUE V. W. C. BULLARD ET AL.

FILED JUNE 18, 1895. No. 5981.

1. **Negotiable Instruments: INDORSEMENTS IN BLANK: LIABILITY OF INDORSER: ORAL AGREEMENTS.** Boston made and delivered his promissory note due in nine months to True. True before maturity of the note indorsed it in blank and sold it to Bullard & Co., and Bullard & Co. before the note's maturity sold and delivered it to a bank. The bank sued Boston as maker and True as indorser of the note and recovered a judgment.

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True then sued Bullard & Co. to recover the amount of the judgment which had been rendered against him in favor of the bank as indorser of said note, alleging that at the time he indorsed the note in blank and sold and delivered it to Bullard & Co. he did so under and by virtue of an oral agreement between them that, notwithstanding he indorsed the note in blank, he was not to be liable thereon as indorser. He did not aver in his petition that he had paid the judgment, or any part thereof, rendered against him in favor of the bank.

2. ———: ———: ———. When the payee of a note indorses his name thereon in blank and delivers said note to a purchaser thereof, the law in effect writes over the signature of said indorser an agreement on his part that if the holder of said note shall present it to the payor thereof at its maturity for payment and it be dishonored, and that if such holder shall then give such indorser notice in a reasonable time of the dishonor of said note, that he, the indorser, will pay it.
3. ———: ———: ———. And on the part of the indorsee of such a note, the contract created by law is that he will present said note at its maturity to the payor thereof for payment, and if it be dishonored, that he will within a reasonable time notify the indorser thereof of such dishonor.
4. ———: ———: ———: EVIDENCE. Between the original parties a blank indorsement may be modified by parol, the entire transaction may be shown by reason of which the indorsement was made, and parol evidence is admissible for the purpose of proving the actual contract made between the indorser and the indorsee at the time of the blank indorsement. (*Holmes v. First Nat. Bank of Lincoln*, 38 Neb., 326.)
5. ———: ———: ———. The contract pleaded between True and Bullard & Co. amounted to this: That the latter agreed that so far as they were concerned as holders of the note they would not look to True for payment thereof; that he was not to be liable to them as an indorser; but they did not agree not to sell and indorse the note, nor did they agree that if they should do so, they would advise the purchaser of the contract existing between them and True.
6. ———: ———: ———. The fact that Bullard & Co. transferred the note before maturity to a bank, and that as against the bank True could not set up as a defense the contract under which he indorsed it to Bullard & Co., did not invest True with a right of action against Bullard & Co.

7. ———: ———: ———. Under no view of the case can True have any cause of action against Bullard & Co. until he shall have paid the judgment rendered on said note or some part thereof.

ERROR from the district court of Hitchcock county.
Tried below before WELTY, J.

J. W. Cole, for plaintiff in error, cited: *Taylor v. Coon*, 48 N. W. Rep. [Wis.], 123; *Gregory v. Hartley*, 6 Neb., 356; *Holmes v. First Nat. Bank of Lincoln*, 38 Neb., 326; *Bradford v. Prescott*, 85 Me., 483; *Sturtevant v. Randall*, 53 Me., 149; *Smith v. Morrill*, 54 Me., 48; *Patten v. Pearson*, 57 Me., 428; *Jones v. Childs*, 8 Nev., 124; *Wright v. Whiting*, 40 Barb. [N. Y.], 240; *Bellom v. Freeborn*, 63 N. Y., 388; *Furnas v. Durgin*, 119 Mass., 500; *Hall v. Nash*, 10 Mich., 304.

William O. Woolman, also for plaintiff in error.

L. H. Blackledge, *contra*, cited: *Dale v. Gear*, 9 Am. Rep. [Conn.], 353; *Charles v. Denis*, 24 Am. Rep. [Wis.], 383; *Doolittle v. Ferry*, 27 Am. Rep. [Kan.], 166; *Weller v. Eames*, 2 Am. Rep. [Minn.], 150; *Churchill v. Hunt*, 3 Den. [N. Y.], 321; *Valentine v. Wheeler*, 23 Am. Rep. [Mass.], 404.

RAGAN, C.

The material facts in this case are: On the 9th of December, 1889, one R. W. Boston made his certain promissory note of that date for \$265, due September 9, 1890. This note was payable to the order of and delivered to one S. L. True. Before the maturity of this note True sold and delivered it to W. C. Bullard & Co., and indorsed it in blank. Before the note matured Bullard & Co. sold it to a bank, and it not being paid at maturity, the bank sued the maker of the note and True as an indorser and obtained a judgment against them. True then brought this suit in

the district court of Hitchcock county against Bullard & Co., reciting the foregoing facts, and alleging that at the time he sold the note to Bullard & Co. and indorsed it, it was orally agreed between him and Bullard & Co. that the sale and indorsement of the note to them should be and was without recourse on him, True; or, in other words, notwithstanding that he indorsed the note in blank, he was not to be or become liable thereon as an indorser. True in his petition did not aver that he had paid the judgment rendered on the note or any part thereof. The district court sustained objections to the evidence offered by True to support the allegations of his petition on the ground that the petition did not state facts sufficient to constitute a cause of action, and directed a verdict for Bullard & Co., on which judgment of dismissal of True's action was rendered, and he prosecutes to this court a petition in error.

The record presents two questions: May the payee of a promissory note, who has indorsed his name on the back thereof and delivered said note to a purchaser, show by parol, in a suit between himself and said purchaser, that by so indorsing and delivering said note, that the liability created thereby was a different liability from that which the law implies against a party by reason of such an indorsement of commercial paper? Or, applied to the facts in the case at bar, is it competent for True to prove by parol that at the time he indorsed and delivered the note in question to Bullard & Co. that the agreement between them was that he, True, should not be liable on said note as an indorser by reason of such indorsement and delivery? When the payee of a note indorses his name thereon in blank and delivers said note to a purchaser thereof, the law in effect writes over the signature of said indorser an agreement on his part that if the holder of said note shall present it to the payor thereof at its maturity for payment and it be dishonored, and that if

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such holder shall then give such indorser notice in a reasonable time of the dishonor of said note, that he, the indorser, will pay it; and on the part of the indorsee of said note, the contract created by the law is that he will present said note at its maturity to the payor thereof for payment, and if it be dishonored, that he will within a reasonable time notify the indorser of said note of such dishonor. It must be admitted that many eminent authorities hold that parol evidence is not admissible to contradict or vary the contract which the law raises by reason of the indorsement in blank and delivery of commercial paper, either on the part of the holder or the indorser; but in *Holmes v. First Nat. Bank of Lincoln*, 38 Neb., 326, this court held that between the original parties a blank indorsement might be modified by parol; that the entire transaction might be shown by reason of which the indorsement was made, and that parol evidence was admissible for the purpose of proving the actual contract made between the indorser and indorsee at the time of the blank indorsement. On the authority of that case we hold that it was competent for True to show by parol that at the time he indorsed and delivered the note to Bullard & Co. that, notwithstanding such indorsement and delivery, he, True, was not to be held liable as an indorser of the note; and that Bullard & Co. in effect purchased the note without recourse on True. But we must not be understood as deciding that the payee of a promissory note, who indorses it in blank and delivers it before maturity, could set up the defense that he in fact sold and indorsed without recourse, as against a subsequent indorsee of said note who purchased it before maturity, in the usual course of business, and without knowledge of the contract between the indorser and first indorsee.

As already stated, True in his petition did not aver that he had paid any part of the judgment which had been rendered against him on said note in favor of the bank to whom it had been sold and assigned by Bullard &

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Co. So far, then, as the petition shows, True has not been damaged. Under no view of the case can he have any cause of action against Bullard & Co. until he shall have paid the judgment rendered on said note or some part thereof. (*Churchill v. Moore*, 15 Kan., 255; *Lott v. Mitchell*, 32 Cal., 24; *Jeffers v. Johnson*, 21 N. J. Law, 73.)

But what was the contract between True and Bullard & Co.? The petition avers that Bullard & Co. "expressly agreed, and it was understood and made a part of the consideration of the sale and transfer of said note, that said defendants Bullard & Co. were to accept and take said note without any liability or recourse whatever on the part of this plaintiff on account of the non-payment of said note at maturity." The most that can be said for this language is that by it Bullard & Co. agreed that so far as they were concerned as holders of the note they would not look to True for payment thereof; that he was not to be liable to them as an indorser. But Bullard & Co. did not agree, so far as the pleadings show, not to sell and indorse this note, nor did they agree that if they did sell and indorse the note they would advise the purchaser of the contract existing between them and True. The mere fact that Bullard & Co. transferred this note before maturity to the bank, and that as against the bank True could not set up as a defense the contract under which he indorsed it to Bullard & Co., does not invest True with a right of action against Bullard & Co. In other words, Bullard & Co. have not violated their contract with True. The petition does not state a cause of action. The judgment of the district court is right and is

AFFIRMED.

JOHN L. DAVIS ET AL V. BENJAMIN T. SNYDER.

FILED JUNE 18, 1895. NO. 4354.

1. **Trial to Court: WAIVER OF RIGHT TO JURY TRIAL: REVIEW.** Where the record in a civil case shows that a legal action was tried to the court without a jury and the record discloses no protest or objection thereto on the part of a litigant, and no application by him for a jury to try the issues, this court will presume that a jury was waived.
2. **Record for Review.** In reviewing cases in this court the transcript filed here is the sole, conclusive, and unimpeachable evidence of the proceedings in the district court. (*Chadron Banking Co. v. Mahoney*, 43 Neb., 214.)
3. **Alteration of Instruments: EVIDENCE: REVIEW.** Action of replevin for property covered by a chattel mortgage, brought by an indorsee before maturity of the note which the mortgage was given to secure. Defense, the note had been materially altered after its execution and delivery without the knowledge or consent of the maker. Evidence examined, and *held* to support the finding of the court in favor of the maker of the note.

ERROR from the district court of Sherman county.
Tried below before HAMER, J.

Darnall, Kirkpatrick & Scott and *A. A. Kendall*, for
plaintiffs in error.

Aaron Wall and *Nightingale Bros.*, *contra*.

RAGAN, C.

This is an action of replevin brought by John L. Davis against Benjamin T. Snyder in the district court of Sherman county. Davis claimed to have a special ownership in and to be entitled to the property replevied by virtue of a chattel mortgage made thereon by Snyder to one Hogue on the 21st of May, 1888, to secure a note of \$406.78 with interest, due seven months after date, made and delivered by Snyder to Hogue and by him transferred

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to Davis in the ordinary course of business for a valuable consideration before due. Snyder's defense to the action was that on the 21st of May, 1888, he had given a note to Hogue for the sum of \$106.78 and pledged the property replevied by a chattel mortgage to Hogue to secure that note and interest, and that the note and mortgage had been materially altered without his knowledge or consent after their execution and delivery by him to Hogue in this: That the word "one" in the note and mortgage had been erased and the word "four" written in its place, thus making the note and mortgage read \$406.78 instead of \$106.78 as originally written and delivered. There was a trial to the court without a jury, with a finding and judgment in favor of Snyder, to reverse which Davis has prosecuted to this court a proceeding in error. Two points are made in this case:

1. It is first argued by Davis that the court erred in depriving him of the right of trial of the issues made by the pleadings to a jury. Of course this was a legal action, and for the trial of the issues made by the pleadings either party was entitled to a jury. (Sec. 6, art. 1, Constitution, 1875; sec. 280, Code of Civil Procedure.) But the record does not disclose that Davis demanded a jury to try the issues of this case. Where the record in a civil case shows that a purely legal action was tried to the court without a jury, and the record discloses no protest or objection thereto on the part of a litigant and no application by a litigant for a jury to try the issues, this court will presume that a jury was waived. Again, the record in this case affirmatively shows that the case came on to be heard on the 7th of December, 1889, on the petition of Davis and the answer of Snyder, "parties present in court with their attorneys, and a jury being waived, was submitted to the court," etc. This record imports absolute verity. In reviewing cases in this court the transcript here filed is the sole, conclusive, and unimpeachable evidence of the proceedings in the

district court. (IRVINE, C., in *Chadron Banking Co. v. Mahoney*, 43 Neb., 214.)

2. The second assignment is that the finding of the district court is not supported by sufficient evidence. This finding was based on conflicting testimony. Hogue and his wife testified on the trial for Davis that neither the note nor mortgage had been altered; that Snyder on the 21st of May, 1888, was indebted to Hogue in the sum of \$406.78; that as an evidence of that debt he executed the note for that amount in question in this case, and to secure it executed and delivered the chattel mortgage in question. On the other hand Snyder positively swears that on the 21st of May, 1888, he already owed Hogue \$406.78, and on that date paid him \$300, and executed a note to him for \$106.78 and secured it by a chattel mortgage; that the note and mortgage executed were the ones put in evidence in this case, and that they had been changed so as to read \$406.78, etc. There was some other evidence on behalf of both Davis and Snyder which tended to corroborate their respective theories. In addition to these, "experts," so called, testified to the question whether the note showed that the word "one" had originally been written in it, that erased and the word "four" written in its place. The opinion of these experts, as is usual, tended to support the theories of the party calling them. In the bill of exceptions filed in this court we have not the original note and mortgage which were before the district judge. We have only type-written copies, and therefore are deprived of the privilege of entering the lists and competing with the experts who testified below. With the evidence in this condition we cannot say that the finding of the district court, that the note and mortgage had been materially altered after their execution and delivery, and without the knowledge or consent of Snyder, is not supported by sufficient evidence. The judgment must be, and is,

AFFIRMED.

OMAHA & REPUBLICAN VALLEY RAILWAY COMPANY
v. JAMES B. HALE.

FILED JUNE 18, 1895. No. 6001.

1. **Penalties: RIGHT OF INFORMER TO MAINTAIN SUIT.** An informer cannot maintain an action in his own name to recover a penalty, unless authorized so to do by statute.
2. **Railroad Companies: FAILURE TO WHISTLE OR RING BELL AT PUBLIC CROSSINGS: PENALTY: CONSTRUCTION OF STATUTE.** Section 104, chapter 16, Compiled Statutes, construed, and held, (1) that the statute is highly penal in its nature and should be strictly construed; (2) that a corporation, by violating the law, forfeits to its sovereign, the state, not to the informer, the penalty denounced by the act; (3) that the statute does not authorize the informer to bring the action in his own name, nor, when brought, to control it.

ERROR from the district court of Lancaster county.
Tried below before HALL, J.

See opinion for statement of the case.

J. M. Thurston, W. R. Kelly, and E. P. Smith, for plaintiff in error:

The plaintiff in error insists that this action cannot be maintained, because, in this state, no officer is known as an informer, nor is power given to any person as such; and, in the section upon which this action is predicated, no authority is given to any person to commence suit in his own behalf, or for himself and any second party, to recover therein the penalty, or any portion thereof, mentioned in the statute. (*Foster's Case*, 6 Coke, [Eng.], 56; *State v. Sinnot*, 15 Neb., 472; *Iler v. Cronin*, 34 Neb., 424; *Graham v. Kibble*, 9 Neb., 182; *Stone v. Lannen*, 6 Wis., 485; *Shields v. Klopff*, 70 Wis., 69; *City of Hastings v. Thorne*, 8 Neb., 160; *City of Tecumseh v. Phillips*, 5 Neb.,

312; *State v. City of Lincoln*, 6 Neb., 12; *State v. Hems*, 14 Neb., 477; *Fleming v. Bailey*, 5 East [Eng.], 313; *Barnard v. Gostling*, 2 East [Eng.], 569; *Davis v. Edmonson*, 3 B. & P. [Eng.], 382; *Colburn v. Swett*, 1 Met. [Mass.], 232; *Smith v. Look*, 108 Mass., 139; *Wheeler v. Goulding*, 13 Gray [Mass.], 539; *Nye v. Lamphere*, 2 Gray [Mass.], 295; *Lynch v. Steamer "Economy"*, 27 Wis., 69; *United States v. Laeski*, 29 Fed. Rep., 701; *State v. Hannibal & St. J. R. Co.*, 1 S. W. Rep. [Mo.], 134; *Arzbacher v. Mayer*, 53 Wis., 380; *Willard v. Reas*, 26 Wis., 540; *Willard v. Comstock*, 58 Wis., 565; *Neville v. Clifford*, 55 Wis., 161; *St. Louis, A. & T. R. Co. v. State*, 19 S. W. Rep. [Ark.], 573; *Otis v. Thorne*, 18 Ala., 395; *Davis Avenue R. Co. v. Mallon*, 57 Ala., 168; *Dubbers v. Goux*, 51 Cal., 154.)

Pound & Burr and *Roscoe Pound*, *contra*, cited as to right of James B. Hale to maintain the action: *Chicago & A. R. Co. v. Howard*, 38 Ill., 414; *Drew v. Hilliker*, 56 Vt., 641; *Winne v. Snow*, 19 Fed. Rep., 507; *Middleton v. Wilmington & W. R. Co.*, 95 N. Car., 167; *Commonwealth v. Howard*, 13 Mass., 222; *State v. Bishop*, 7 Conn., 181; *State v. Smith*, 49 N. H., 155; *Vandeventer v. Van Court*, 2 N. J. Law, 155; *Mitchell v. State*, 12 Neb., 538; *Doss v. State*, 6 Tex., 433; *Caswell v. Allen*, 10 Johns. [N. Y.], 118; *Wardens v. Cope*, 2 Ired. [N. Car.], 44; *Rayham v. Rounseville*, 9 Pick. [Mass.], 44; *Cincinnati, S. & C. R. Co. v. Cook*, 37 O. St., 265.

W. H. Woodward, for Lancaster county.

RAGAN, C.

James B. Hale, suing for himself and the state of Nebraska, brought this suit in the district court of Lancaster county against the Omaha & Republican Valley Railway Company to recover the penalty denounced by section 104,

chapter 16, Compiled Statutes, 1893, against corporations owning railroads that had neglected to sound a whistle or ring a bell at railroad and street crossings. The petition contained seventy-six causes of action, substantially alike, and prayed judgment as follows: "Wherefore the plaintiff prays judgment against the defendant for the sum of \$3,800 and costs of suit." Hale had a verdict and judgment, and the railroad company has prosecuted to this court a petition in error. The section of the statute on which this action is based (said section 104) is as follows: "A bell of at least thirty pounds weight or a steam whistle shall be placed on each locomotive engine, and shall be rung or whistled at the distance of at least eighty rods from the place where the said railroad shall cross any other road or street, and be kept ringing or whistling until it shall have crossed said road or street, under a penalty of fifty dollars for every neglect, to be paid by the corporation owning the railroad, one-half thereof to go to the informer, and the other half to this state, and also be liable for all damages which shall be sustained by any person by reason of such neglect." Can the informer mentioned in said statute maintain an action in his own name to recover the penalty provided for therein? There seems to be some conflict among the authorities on this question.

In *United States v. Laescki*, 29 Fed. Rep., 699, it was held that such an action must be brought in the name of the informer, and that the penalty could not be recovered by indictment at the instance of the government. But the statute on which that action was predicated provided: "Every person who violates this section shall be liable to a penalty of one hundred dollars, recoverable, one-half to the use of the informer." The word "recoverable" in this statute would seem to authorize a suit for the penalty by the informer.

The *Chicago & A. R. Co. v. Howard*, 38 Ill., 415, was an action brought by Howard, suing for himself and the

state of Illinois, against the railroad company. The statute on which the action was based provided that if the railroad company should fail to sound a whistle or ring a bell, etc., "it shall forfeit a penalty of fifty dollars, one-half to the informer and the other half to the state." It is to be observed that this statute is almost identical with ours. The court held that the suit was properly brought in the name of Howard.

In *Lynch v. Steamer "Economy,"* 27 Wis., 69, it was held that the informer might maintain an action in his own name for the penalty. The court said: "The action is evidently a *qui tam* action, and, we are inclined to hold, may be brought in the name of the complainant (informer) alone. It is a general rule that a common informer cannot sue for a penalty unless authorized so to do by statute; but many cases hold, where the statute gives the forfeiture, or a part of it, 'to any person who shall prosecute therefor,' that this, or equivalent language, confers express authority upon him to sue in his own name. * * * But if there were any doubt upon this point, it is removed by the language making the penalty a demand or lien against the boat, 'to be sued for and collected in the manner provided' for the collection of demands against boats and vessels. This language, we think, shows that the statute contemplated that the complainant (informer) should be the plaintiff in the action, and that the proceeding should be analogous to an ordinary suit for the collection of a demand against a vessel."

The statute of Arkansas provided that railroad companies should cause a whistle to be sounded or bell rung, etc., "under a penalty of two hundred dollars for every neglect, to be paid by the corporation owning the railroad, one-half thereof to go to the informer and the other half to the county," etc. One Bell sued in his name, for the use of the state of Arkansas and Miller county, a railroad company to recover the penalty provided for by said statute.

The court said: "The demurrer to the complaint was properly sustained, as it showed that the plaintiff was not, and that the state was, the party entitled to prosecute the action." (*St. Louis, A. & T. R. Co. v. State*, 19 S. W. Rep. [Ark.], 572.)

In *Nye v. Lamphere*, 2 Gray [Mass.], 295, the court sustained a suit brought by an informer in his own name to recover a statutory penalty, but the statute on which the action was based provided that the penalty was "'to be recovered in any court proper to try the same, one-half to the use of the said town and the other half to any person who shall prosecute therefor.'" This statute expressly conferred authority on the informer to prosecute the action. The court said: "The defendant's objection to the maintenance of this action is that the plaintiff is an informer, and therefore cannot sue in his own name, because authority so to sue is not given him by statute. And undoubtedly it is a general rule that a common informer cannot sue for a penalty, without express statute authority. * * * But by what terms in a statute is such authority conferred? Certainly by terms like those used in the statute on which this action is brought; namely, by giving the forfeiture, or a part of it, 'to any person who shall prosecute therefor.'"

In *Higby v. People*, 4 Scam. [Ill.], 166, a suit was brought to recover a penalty in the name of the people. The statute provided that the penalty sued for should go to the informer and the county; and the court held that the state had no interest in the recovery; that "the statute not authorizing the suit to be instituted in the name of the people, it was improperly brought, and the court erred in not dismissing it."

In *Colburn v. Swett*, 42 Mass., 232, it was held: "As a general rule, a common informer cannot maintain an action for a penalty, unless power is given to him for that purpose by statute."

In *Fleming v. Bailey*, 5 East [Eng.], 313, it was held

that at common law an informer could not sue in his own name to recover a penalty ; that he had no right to maintain an action for a penalty except such right was conferred by statute. To the same effect see *Barnard v. Gosling*, 2 East [Eng.], 569.

These authorities, we think, without serious conflict, recognize this rule, an informer cannot maintain an action in his own name to recover a penalty unless authorized so to do by statute. The statute on which this action is based does not expressly authorize the penalty denounced by said statute to be sued for and recovered by an informer, nor does the statute contain any language from which such an authority may be inferred. The act provides that the penalty shall be paid by the corporation owning the railroad. Paid to whom? We think, paid to the state. The corporation, by violating the law, forfeited to its sovereign, the state, not to the informer, the penalty denounced by the act. It is true that the law holds out an inducement to the citizen to inform the officers charged with the execution of the law of its violation and in effect offers the informer a reward for his information ; but it does not authorize the informer to bring the action, nor, when brought, to control it.

Counsel for the defendant in error insist that section 617 of the Code of Civil Procedure authorizes an informer to maintain an action for the penalty in his own name, or at least that said section is a legislative recognition of the right of an informer to maintain a suit. The section is as follows: "If any informer, under a penal statute, to whom the penalty, or any part thereof, if recovered, is given, shall dismiss his suit or prosecution, or fail in the same, he shall pay all costs accruing on such suit or prosecution, unless he be an officer whose duty it is to commence the same." We think this argument is untenable. If a statute fixes a pecuniary penalty for its violation and gives a part of such penalty to an informer, and if the statute, or some other,

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authorizes such informer to maintain an action in his own name for such penalty, then, by the section of the Code referred to, if such informer should bring his action and dismiss it or fail in the same, he would be liable for the costs. The statute on which the case at bar is based is one highly penal in its nature, and it must be strictly construed; and since this statute, nor any other, neither expressly, nor by implication, authorizes the penalties prescribed therein to be sued for and recovered by the informer, we hold that Hale cannot maintain this action. The judgment of the district court is reversed and the action dismissed.

REVERSED AND DISMISSED.

JOHN V. FARWELL & COMPANY ET AL. V. CHARLES
KLOMAN ET AL.

FILED JUNE 18, 1895. No. 5796.

Sales: FRAUD OF PURCHASER: RESCISSION: VOLUNTARY ASSIGNMENTS: LIEN ON PROPERTY IN HANDS OF ASSIGNEE: EQUITY: TRUSTS: PRINCIPAL AND AGENT. A wholesale merchant sold goods on credit, induced to do so by the fraud of his vendee. The latter disposed of the goods for money and other property, but no particular property remaining in his hands could be identified as having been purchased with the fraudulently acquired property. The vendee made a general assignment for the benefit of his creditors. The wholesale merchant discovered the fraud practiced upon him, rescinded the contract of sale, and filed a bill in equity, praying that the entire estate of the insolvent vendee might be declared a trust fund in the hands of his assignee, of which the wholesale merchant should be the beneficiary, and that he be decreed a first lien upon all said estate to secure the amount due him from his vendee for the property so fraudulently acquired. *Held*, (1) That the relation existing between the wholesale merchant and his vendee at the time of the sale of the goods was that of an ordinary debtor and creditor, not that of principal and agent; (2) that the original

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contract of sale, although induced by fraud, was not absolutely void, but voidable at the election of the vendor within a reasonable time after discovering the fraud; (3) that the vendor, having discovered the fraud and rescinded the contract of sale within a reasonable time, might replevy the goods parted with; (4) that the goods having been disposed of by the fraudulent vendee, a court of equity would award the vendor any particular property, or a lien thereon, which could be identified as having been purchased solely with the property fraudulently acquired by the vendee; (5) but equity would not decree the entire estate of the insolvent vendee a trust fund, of which the defrauded vendor was the beneficiary, and give him a lien on such estate for the amount due him from his vendee.

ERROR from the district court of Custer county. Tried below before HARRISON, J.

The opinion contains a statement of the case.

Tenney, Church & Coffeen and Harwood, Ames & Kelly, for plaintiffs in error:

The contention of plaintiffs is that by reason of the facts recited in the petition, all of Cline's property, including his stock in trade, real estate, notes, and book accounts, became impressed with a trust in favor of plaintiffs for the value of the goods thus fraudulently obtained; that the assignee took them subject to that trust, and that plaintiffs are entitled to a preferential lien upon the whole fund for the amount of such value. (Perry, Trusts, secs. 835, 836, 838; *Whitecomb v. Jacob*, 1 Salk. [Eng.], 161; *Miller v. Race*, 1 Burr. [Eng.] 452; *Docker v. Somes*, 2 M. & K. [Eng.], 655; *Pennell v. Deffell*, 4 De Gex, M. & G. [Eng.], 372; *Murray v. Pinkett*, 12 Cl. & Fin. [Eng.], 764; *Knatchbull v. Hallett*, 13 L. R., Ch. Div. [Eng.], 696; *Ex parte Cook*, 4 L. R., Ch. Div. [Eng.], 123; *Dow v. Berry*, 18 Fed. Rep., 121; *Frelinghuysen v. Nugent*, 36 Fed. Rep., 239; *Cook v. Tullis*, 18 Wall. [U. S.], 332; *Central Nat. Bank v. Connecticut Ins. Co.*, 104 U. S., 54; *Florida Land & Improvement Co. v. Merrill*, 52 Fed. Rep., 77; *Clapp v.*

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Emery, 98 Ill., 523; *First Nat. Bank of Elgin v. Schween*, 127 Ill., 573; *King v. Hamilton*, 16 Ill., 190; *Peak v. Ellicott*, 1 Pac. Rep. [Kan.], 499; *Merket v. Smith*, 5 Pac. Rep. [Kan.], 394; *Continental Nat. Bank v. Weems*, 6 S. W. Rep. [Tex.], 802; *People v. Dansville Bank*, 39 Hun [N. Y.], 187; *People v. Rochester City Bank*, 96 N. Y., 32; *Newton v. Porter*, 69 N. Y., 133; *Cavin v. Gleason*, 105 N. Y., 256; *New York & Brooklyn Ferry Co. v. Moore*, 18 Abb. New Cas. [N. Y.], 106; *Importers & Traders Bank v. Peters*, 25 N. E. Rep. [N. Y.], 319; *Hooley v. Gieve*, 9 Abb. New Cas. [N. Y.], 8; *Bresnihan v. Sheehan*, 125 Mass., 11; *Englar v. Offutt*, 16 Atl. Rep. [Ind.], 497; *McLeod v. Evans*, 66 Wis., 401; *Francis v. Evans*, 33 N. W. Rep. [Wis.], 93; *Bowers v. Evans*, 36 N. W. Rep. [Wis.], 629; *Lee v. Simmons*, 27 N. W. Rep. [Wis.], 174; *Harrison v. Smith*, 83 Mo., 210; *Stoller v. Coates*, 88 Mo., 514; *Snorgrass v. Moore*, 30 Mo. App., 232; *Independent District of Boyer v. King*, 45 N. W. Rep. [Ia.], 908; *Davenport Plow Co. v. Lamp*, 45 N. W. Rep. [Ia.], 1049; *Bunton v. King*, 45 N. W. Rep. [Ia.], 1050; *Third Nat. Bank of St. Paul v. Stillwater Gas Co.*, 30 N. W. Rep. [Minn.], 440; *Brocchus v. Morgan*, 5 Cent. L. J. [Tenn.], 53; *Leland v. Colver*, 34 Mich., 418; *Carter v. Lipsey*, 70 Ga., 417; *Farmers & Merchants Nat. Bank v. King*, 57 Pa. St., 202; *Sadler's Appeal*, 87 Pa. St., 154; *Greene v. Haskell*, 5 R. I., 456; *First Nat. Bank v. Hummell*, 23 Pac. Rep. [Col.], 986; *Jewett v. Dronger*, 30 N. J. Eq., 291; *Farmers & Traders Bank v. Kimball Milling Co.*, 47 N. W. Rep. [S. Dak.], 402; *Cogswell v. Griffith*, 23 Neb., 344; *Wilson v. Coburn*, 35 Neb., 530; *Taylor v. Plumer*, 3 M. & Sel. [Eng.], 574; *Barnard v. Campbell*, 65 Barb. [N. Y.], 289; *Hodgeden v. Hubbard*, 18 Vt., 504; *Amer v. Hightower*, 11 Pac. Rep. [Cal.], 697; *Preston v. Spaulding*, 120 Ill., 228; *Farwell v. Hanchett*, 120 Ill., 577; *Masson v. Bovet*, 1 Den. [N. Y.], 69; *Hammond v. Pennock*, 61 N. Y., 145; *Guckenheimer v. Angevine*, 81 N. Y., 394.)

Where one has been fraudulently induced to enter into any contract or agreement under which he parts with the possession of his property to the wrong-doer, even although the apparent title accompanies the possession, he may, on discovery of the fraud, if the property still remains in specie and distinguishable in the hands of the wrong-doer, rescind or disaffirm the contract and retake the property by replevin or other suitable means or process. (Wells, Replevin, secs. 318, 319; *Kellogg v. Turpie*, 93 Ill., 265; *Beach v. Schmultz*, 20 Ill., 185; *Diversey v. Johnson*, 93 Ill., 547; *First Nat. Bank v. Schween*, 127 Ill., 573.)

If one charged with the custody of money or other personal property of another wrongfully intermingles it with his own so that all which is certainly known respecting its identity, is that it forms a part of a mass of similar property still in the hands of the wrong-doer, the law will award the party wronged the possession of the whole mass, leaving the wrong-doer to identify and reclaim his own if he can.

If the wrong-doer has not only intermingled the property with his own, but has converted or transmuted the general mass into other property, whether by one or many successive transmutations, so that all which is certainly known respecting the original is that it has contributed to produce the fund or other property then in the hands of the wrong-doer, equity, more lenient than the law, will impose upon such resulting product a charge or lien for an amount sufficient to reimburse the party wronged. (*Harford v. Lloyd*, 20 Beav. [Eng.], 310; *Long v. Majestre*, 1 Johns. Ch. [N.Y.], 305; *Wallace v. Duffield*, 2 S. & R. [Pa.], 521; *Davenport Plow Co. v. Lamp*, 45 N. W. Rep. [Ia.], 1049; *Bunton v. King*, 45 N. W. Rep. [Ia.], 1050; *Dow v. Berry*, 18 Fed. Rep., 121; *Wells v. Stout*, 38 Fed. Rep., 807; *Voight v. Lewis*, 9 Chicago Legal News [Pa.], 65; *Thompson v. Perkins*, 3 Mason [U. S. C. C.], 232; *Cragie v. Hadley*, 99 N. Y., 131; *Smith v. Combs*, 24 Atl. Rep. [N. J.], 9.)

Darnall & Kirkpatrick, contra, cited : *School Trustees v. Kirwin*, 25 Ill., 73 ; *Goldthwaite v. Ellison*, 12 So. Rep. [Ala.], 812 ; *Preston v. Spaulding*, 120 Ill., 228 ; *Philadelphia Nat. Bank v. Dowd*, 38 Fed. Rep., 172 ; *Wilson v. Coburn*, 35 Neb., 530 ; *Union Nat. Bank v. Goetz*, 27 N. E. Rep. [Ill.], 907 ; *Slater v. Oriental Mills*, 27 Atl. Rep. [R. I.], 443 ; *Monotuck Silk Co. v. Flanders*, 58 N. W. Rep. [Wis.], 383.

RAGAN, C.

On and for three years prior to January, 1890, John V. Farwell & Co. (hereinafter called "Farwell & Co.") were wholesale merchants domiciled and doing business in the city of Chicago, in the state of Illinois, and W. H. Cline was a retail merchant resident and doing business in the city of Broken Bow, Nebraska. Farwell & Co. brought this suit in equity in the district court of Custer county against Charles Kloman, the assignee of said Cline. Farwell & Co., in their petition, alleged that for three years prior to January, 1890, they had been in the habit of selling goods on credit to Cline; that on January 31, 1890, Cline made a statement in writing to them, Farwell & Co., setting forth his assets and liabilities, representing to them that he was at that time possessed of property beyond all his debts of the value of \$16,000; that Farwell & Co., believing this statement to be true, and relying thereon, on the 27th of June, 1890, and at divers times between that date and November 20, 1890, sold and delivered merchandise on credit to Cline to the extent of \$8,500; that on the 10th of January, 1891, Cline made an assignment, under the statute of Nebraska, for the benefit of his creditors; that said Charles Kloman was the assignee of said Cline; that the inventoried value of the estate turned over by said Cline to his said assignee was \$29,000; that said assets consisted of merchandise, real estate, notes, and book accounts, and

that his scheduled liabilities were about \$60,000 ; that the statement made by Cline to them, Farwell & Co., on January 31, 1890, was false, and known by Cline to be false ; that Cline, at the time he made the statement, was insolvent ; that in selling said goods upon credit to Cline, Farwell & Co. relied entirely upon the truth of the statement made by him, and which statement Cline made for the purpose of obtaining credit ; that only a very small portion of the goods, if any, which Farwell & Co. sold to Cline between June and November, 1890, now remain in the possession of Cline's assignee ; that if any of said goods now remain they are in broken lots and cut pieces and so mixed and confused with goods of a like character that their distinct identity cannot be ascertained ; that Cline, prior to the time he made an assignment, had sold all or nearly all the goods purchased of Farwell & Co. and invested the proceeds thereof either in real estate or other goods or in paying for goods previously bought by him and now on hand, or said proceeds are now represented by outstanding notes and accounts due him ; that by reason of the fraud of Cline in procuring and in confusing said goods he never acquired any valid right or title to the same or to the proceeds thereof as against Farwell & Co. ; that about the 4th of February, 1891, they, Farwell & Co., discovered for the first time that the statement made to them by Cline was false, and thereupon they at once elected to and did rescind the contract of sale of said goods to him ; that a large number of creditors of Cline have filed their claims with said assignee, the amount of said claims greatly exceeding in amount the value of Cline's estate. The prayer of the petition was for a decree that Cline held the property which he purchased and the proceeds thereof in trust for Farwell & Co., and that they might be decreed to have a first lien upon the entire estate of Cline to secure the amount due them. The district court sustained a general demurrer to this petition, and Farwell

& Co. refusing to plead further, the petition was dismissed; and to reverse this order they have prosecuted to this court a petition in error.

The case amounts to this: A vendor of merchandise parts with the title and possession of his goods on credit to his vendee, induced to do so by the fraud of the latter. The vendee disposes of the fraudulently acquired property for money and other property, but no particular property remaining in the hands of the vendee can be identified as having been purchased with the property fraudulently acquired. The vendee makes a general assignment for the benefit of his creditors. The vendor discovers the fraud practiced upon him by the vendee, rescinds the contract of sale, and asks a court of equity to decree that the property which the vendee fraudulently acquired and its proceeds is a trust fund in his hands, of which the vendor is the beneficiary, though the identical property fraudulently acquired has been by the vendee disposed of, and the identity of the property acquired by the vendee with the fraudulently acquired property or its proceeds cannot be ascertained, and that the vendor be given a first lien upon the entire estate of his vendee to secure the amount due for the property fraudulently parted with. It is not doubted that where goods are sold upon credit induced by the fraudulent representations of the vendee, the vendor may rescind the sale upon the discovery of the fraud and replevy the goods. (*Tootle v. First Nat. Bank of Chadron*, 34 Neb., 863; *McKinney v. First Nat. Bank of Chadron*, 36 Neb., 629.) And if the identical property cannot be found by the officer, the action will proceed as one for damages, and a judgment for the value of the goods fraudulently obtained would be rendered in favor of the vendor. But this doctrine does not proceed upon the theory that the original contract of sale, although induced by fraud, was absolutely void, but merely voidable at the election of the vendor within a reasonable time after discovering the fraud. In

the case at bar, Farwell & Co., after discovering that Cline had obtained their goods by fraud, had the right to rescind the contract of sale within a reasonable time and to replevy the goods parted with; and it may be that a court of equity, a fraud being established, would give to Farwell & Co. any particular property, or a lien thereon, which could be clearly shown to have been purchased solely with the proceeds of the property fraudulently acquired by Cline from them. But does it follow, because Cline obtained goods from Farwell & Co. by fraud, that a court of equity will give them the entire estate of Cline, or a lien thereon, when it appears that such estate was not entirely acquired with the property or its proceeds fraudulently acquired from them?

Counsel for Farwell & Co., in their argument here, say :

“The contention of plaintiffs is that by reason of the facts recited in the petition, all of Cline’s property, including his stock in trade, notes, and book accounts, became impressed with a trust in favor of plaintiffs for the value of the goods thus fraudulently obtained; that the assignee took them subject to that trust, and that plaintiffs are entitled to a preferential lien upon the whole fund for the amount of such value.” To support this contention counsel have furnished us an able and ingenious argument and cited us to a large number of authorities. These authorities we do not regard as in point; and if any authority cited supports the contention of counsel, with all due respect, we decline to follow it. Among the authorities is *Sherwood v. Central Michigan Savings Bank*, 61 N. W. Rep., 352, in which the supreme court of Michigan held, where a mortgagee, who was also a depositor in a bank, gives the bank a mortgage for collection with instructions not to place the amount collected to his credit but to notify him of the collections, as he has a place for it, the money, when collected, belongs to the mortgagee and is held for him in trust by the bank. It is the duty of the bank

under such circumstances to collect and pay over to the mortgagee the money, and in doing so it acts as his agent. If it takes checks in payment, the money received upon such checks belongs to the mortgagee, notwithstanding it may be mingled with other money belonging to the bank. Where in such a case the money of the mortgagee is mingled by the bank with its funds, he has a lien upon the entire fund for the amount belonging to him, and the law presumes that the trust fund remains intact so long as the entire fund is not reduced below the amount of the trust fund. In this case the mortgagee claimed a preferential lien upon the entire assets of the insolvent bank, and the court awarded it to him. A similar rule was announced by this court in *State v. State Bank of Wahoo*, 42 Neb., 896. These authorities have no application to the facts of the case at bar. In the case cited from Michigan, and in the Wahoo bank case, the relation of debtor and creditor, or banker and depositor, never existed between the bank and the claimant of a preferred lien, but rather the relation of principal and agent. In other words, it was always a trust fund and was by the trustee misapplied. In the case at bar the relation between Farwell & Co. and Cline at the time the former parted with their goods was that of vendor and vendee. Farwell & Co. did not put these goods or any part of them in the hands of Cline as their trustee or agent. True it is that Cline having obtained the goods fraudulently and Farwell & Co. having ascertained the fraud and rescinded the contract of sale within reasonable time, from that moment Cline held the identical goods which he had purchased as Farwell & Co.'s trustee, and these goods they might retake or reclaim; and any specific property in Cline's hands which he had acquired with the goods fraudulently obtained from Farwell & Co. a court of equity might decree theirs, held in trust by Cline. But in the case at bar the goods fraudulently obtained of Farwell & Co. by Cline have been disposed of, and it is averred

in the petition that no particular part of his estate can be identified as having been acquired by Cline with the property, or its proceeds, which he fraudulently acquired from Farwell & Co.

In 2 Story, Equity Jurisprudence [13th ed.], 1259, it is said: "The right [to follow the trust fund] ceases only when means of ascertainment fail; which of course is the case when the subject-matter is turned into money and mixed and confounded in a general mass of property of the same description." A great part of the argument of counsel for Farwell & Co. here is devoted to a vehement assault upon this rule. For our part we think the rule a sound one. To overthrow it and adopt the contention contended for by the learned counsel would lead to endless litigation and confusion and work injury and injustice to the innocent. But the rule assailed has received the sanction of this court. In *Wilson v. Coburn*, 35 Neb., 530, Coburn was the assignee of the Bank of Omaha, which had made an assignment, under the statute, for the benefit of its creditors. Wilson filed a petition in the county court, alleging that he had deposited with said bank a sum of money prior to the bank's making an assignment; that at the time he made such deposit the bank was insolvent to the knowledge of its officers, and that such deposit was received with the intention of cheating and defrauding him. He prayed for a judgment declaring him a preferred creditor, and for the payment of his claim in full out of the assets of the insolvent bank. POST, J., speaking for the court, said: "Under the allegations of the petition, is the claimant entitled to preference over other creditors of the insolvent bank, or, in other words, does the petition state a cause of action? We think not. * * * The fact that a bank is insolvent within the knowledge of its officers, and receives the money of a depositor under circumstances which amount to a fraud upon him, is not of itself sufficient to entitle the latter to preference from

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the funds of the bank in the hands of an assignee. He may follow his money while he can trace and distinguish it, or the proceeds thereof, but not after it has passed into the hands of the assignee, mingled with the other funds of the bank." This case was decided upon the correct principle that the relation of creditor and debtor, or banker and depositor, existed between Wilson and the bank at the time the former parted with his money, and that as the money he had deposited had become mixed and mingled with the other funds of the bank, the money and its proceeds were incapable of specific identification, and could not therefore be recovered in specie; nor would a court of equity decree that the assignee of the insolvent bank held its entire estate in trust for the security and payment of the creditor so defrauded. The rule laid down in this case controls the case at bar. The judgment of the district court was right, and is accordingly

AFFIRMED.

HARRISON, J., not sitting.

MILTON MONTGOMERY ET AL. V. GEORGE H. WILLIS.

FILED JUNE 18, 1895. No. 6372.

1. **Landlord and Tenant: HOLDING OVER TERM: AGREEMENT.**
Where a tenant for a year remains in possession over his term, and is recognized as a tenant by the landlord, and no new contract is shown, he becomes a tenant from year to year.
2. ———: ———: **EVIDENCE.** The above rule is, however, only a rule of presumption, which may be rebutted by proof of a different agreement, or of facts inconsistent with the presumption.
3. ———: ———: ———. Therefore, where before the expiration of a lease for one year the tenant informs the landlord that he will not remain for another year, but will remain for a short

period, and pay rent at the old rate for any time he may remain in possession, and the landlord acquiesces, and thereafter receives the rent, a tenancy from year to year, or for another year, is not created.

4. ———: ———: NOTICE OF INTENTION TO QUIT. In such case the tenant, before surrendering possession, is not required to give any notice of his intention to quit.
5. ———: ACTION FOR RENT: BURDEN OF PROOF. Where an action is brought for rent, and the answer does not admit facts sufficient to raise a presumption of a lease entitling the landlord to the rent demanded, the burden of proof is upon the landlord to establish such a lease.
6. INSTRUCTIONS: HARMLESS ERROR. The refusal to give a correct instruction relating solely to the measure of damages is not prejudicial error, where the jury by a verdict for the defendant has shown that it was not brought to a consideration of the measure of damages.

ERROR from the district court of Dawes county. Tried below before KINKAID, J.

The facts are stated by the commissioner.

Albert W. Crites, for plaintiffs in error:

By holding the premises over the period of the lease, the defendant became a tenant from year to year. (*Hunter v. Frost*, 49 N. W. Rep. [Minn.], 327; *Scott v. Beecher*, 52 N. W. Rep. [Mich.], 20; *Haynes v. Aldrich*, 31 N. E. Rep. [N. Y.], 94.)

The measure of damages by reason of defendant's abandonment of the premises is the difference between the rent plaintiffs should have received and the amount they actually did receive on reletting. (*Respien v. Porta*, 26 Pac. Rep. [Cal.], 967; *Hayward v. Range*, 33 Neb., 836; *Allen v. Saunders*, 6 Neb., 436; *Bowen v. Clark*, 30 Pac. Rep. [Ore.], 430; *Underhill v. Collins*, 30 N. E. Rep. [N. Y.], 576.)

The following cases were also cited by plaintiffs in error: *Davidson v. Burke*, 32 N. E. Rep. [Ill.], 514; *Dunbier v.*

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Day, 12 Neb., 596; *Newton v. Pope*, 1 Cow. [N. Y.], 109; *Lomer v. Meeker*, 25 N. Y., 361; *Mason v. Lord*, 40 N. Y., 483; *Wilkie v. Roosevelt*, 3 Johns. Cas. [N. Y.], 66; *Rudd v. Davis*, 3 Hill [N. Y.], 287; *Robertson v. Dodge*, 28 Ill., 161; *Dolsen v. Arnold*, 10 How. Pr. [N. Y.], 528; *Kerr v. Simmons*, 8 Mo. App., 431; *Clapp v. Noble*, 84 Ill., 62; *Laguerenne v. Dougherty*, 35 Pa. St., 45; *Finney v. City of St. Louis*, 39 Mo., 177; *Holley v. Metcalf*, 12 Brad. [Ill.], 141; *Esterly v. Pringle*, 41 Neb., 265; *Goldsborough v. Gable*, 38 N. E. Rep. [Ill.], 1025; *Critchfield v. Remaley*, 21 Neb., 178; *Hayward v. Range*, 33 Neb., 839; *Prickett v. Ritter*, 16 Ill., 96; *Shirk v. Hoffman*, 58 N. W. Rep. [Minn.], 990.

D. B. Jenckes and C. H. Bane, contra, cited: *Wheeler v. Walden*, 17 Neb., 125; *Bowen v. Haskell*, 55 N. W. Rep. [Minn.], 629; *Buffalo County Nat. Bank v. Hanson*, 34 Neb., 455; *Welcome v. Hess*, 27 Pac. Rep. [Cal.], 369.

IRVINE, C.

This was an action for rent by Montgomery and Crites against George H. Willis and John U. Willis, the petition alleging that the plaintiffs leased certain premises to the defendants, who were partners, for one year from the 15th of April, 1890, reserving a rent of \$35 per month, payable on the 15th day of each month; that at the expiration of the term the defendants, with the consent of plaintiffs, held over and became bound for another term of one year from the 15th of April, 1891; that on the 15th day of August they abandoned the premises and refused to pay further rent, to the damage of plaintiffs in the sum of \$150. The defendant George Willis answered, admitting the lease for one year after April 15, 1890, and averring that prior to the termination of that lease the defendants dissolved partnership, and the plaintiffs released the firm and agreed with the defendant George Willis that he should occupy

the premises for three months; that the defendant paid rent to the 14th day of August, when he vacated the premises, and delivered the keys to the plaintiffs, who received them. There was a verdict and judgment for defendant, and the plaintiffs bring the case here for review.

The defendant Willis testified that before the expiration of the first term he informed Mr. Crites of the dissolution of the partnership, and that he, Willis, would not take the premises for another year, but would occupy them for a short time and pay rent at the old rate for any period which he might occupy them; that Crites acquiesced, and from month to month received the rent from him. Mr. Crites, in the most emphatic terms, denies this transaction, and in the brief contends that the facts should be found in accordance with his testimony. It is not for us, however, to weigh this testimony. It was squarely conflicting, and the verdict of the jury, which has been sustained on motion for a new trial by the trial judge, cannot be disturbed. Accepting Mr. Willis' version of the facts, no tenancy from year to year was established. Such a tenancy will be presumed where a tenant remains in possession after the expiration of his term, and his tenancy is recognized by the landlord, where no new contract was made. (*Critchfield v. Remaley*, 21 Neb., 178.) This rule is, however, only a rule of presumption, and the presumption is rebutted by proof of a different agreement, or of facts inconsistent with the presumption. (*Shipman v. Mitchell*, 64 Tex., 174; *Williamson v. Paxton*, 18 Gratt. [Va.], 475; *Grant v. White*, 42 Mo., 285; *Secor v. Pestana*, 37 Ill., 525.) *Shipman v. Mitchell* was a case analogous to that before us. In that case it was held that if, at or before the expiration of the former lease, the landlord informed the tenant that he would not be permitted to remain another year, but only from month to month, then no tenancy from year to year could be implied. In the case before us it was the tenant who informed the landlord he would not remain another

year. But the principle is the same. Nor was there, under this evidence, any necessity of a notice by the tenant of his intention to quit. If, as he testifies, he agreed to pay rent only so long as he saw fit to occupy the premises, and the landlord acquiesced in this and received rent as such under this agreement, the tenant was at liberty to terminate the lease at any time by surrendering the possession. The foregoing considerations answer the argument of plaintiffs in error that the verdict was not supported by the evidence. In addition to this assignment, there are several assignments relating to the instructions.

The plaintiffs requested the court to instruct that their measure of damages would be the amount of rent that would accrue during the remainder of the year, less any amount realized from other tenants. There was no prejudicial error in refusing this instruction, because, first, the jury having found for the defendant, the question of the measure of damages did not present itself to them for consideration; secondly, the court, on its own motion, instructed the jury that if the finding should be for plaintiffs, then they should recover for the time the premises remained unused, until plaintiffs put other tenants therein. The undisputed evidence shows that when new tenants were procured, it was at the same rent which defendant had paid, so that while the instruction asked by plaintiffs stated the law correctly, the instruction given, under the evidence in the case, had the same effect.

The court of its own motion gave the following instructions:

"5. The jury are instructed by the court if plaintiffs shall recover in this case it must be upon the ground as claimed by them, that defendants continued to hold under said lease of April 14, 1890, until its expiration, and that they continued thereafter to occupy and hold said premises without any new or different agreement, and that they then abandoned and gave up said premises and refused to pay

further rent without the consent of the plaintiffs. If convinced by a preponderance of the evidence that such was the fact, then the verdict should be for the plaintiffs for the time said premises remained unused after such abandonment until plaintiffs took possession thereof by placing other tenants therein.

"6. The jury are instructed by the court, if convinced by the evidence that prior to the expiration of said lease plaintiffs agreed to release said defendants from further liability thereon, and it is further convinced that neither the firm of Willis Bros., as a firm, nor its two individual members, George H. Willis and John U. Willis, together held and occupied said premises after the expiration of said lease of April 14, 1890, and if further convinced that defendant George H. Willis, who is now in court, continued after April 15, 1891, to occupy said premises under and by virtue of an agreement had with plaintiff Crites for plaintiffs that he individually might hold and occupy said premises for an indefinite time at the rate of \$35 per month, then your verdict should be for defendants."

It is claimed that each of these instructions was erroneous for misplacing the burden of proof. We do not think so. The answer of defendant Willis contained a general denial of all matter not specially admitted. It did not admit facts sufficient to imply a tenancy from year to year. It admitted a holding over, but under a new agreement. The burden of proof was on the plaintiffs to establish a lease entitling them to recover, and not upon the defendant to establish by a preponderance of evidence the particular lease which he pleaded.

It is also claimed that the sixth instruction was erroneous for submitting to the jury the question as to whether the landlord had released the firm of Willis Bros. and accepted George H. Willis as sole tenant. It is claimed that this was not in issue. It is not necessary to determine whether this would have to be specially pleaded to be

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availed of, because it was specially pleaded in the second paragraph of the answer.

After this case was considered and a decision reached the plaintiffs in error filed an additional brief. The authorities therein cited have been considered, but they do not change our opinion that the rule whereby, from a holding over the term, a new tenancy is presumed on the terms of the original lease, is a *prima facie* presumption only, and that the conversation and transactions testified to by Willis were sufficient to overcome that presumption. Whether or not the jury found correctly on the conflicting testimony in the case we cannot determine. The writer, merely as the expression of his individual views, would say that if it were his duty to determine the facts in the first instance from the bill of exceptions he would find them in favor of the plaintiffs. But the rule governing the review of cases on the evidence by this court is so well established that it would not now be departed from, even if it were not thought to be sound.

AFFIRMED.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY
V. WILLIAM C. PUTNAM.

FILED JUNE 18, 1895. No. 6177.

1. **Negligence: PERSONAL INJURIES: PLEADING.** In an action to recover damages for personal injuries, alleged to be caused by the negligence of another, it is not necessary for the plaintiff, in his petition, to plead the particular precautions he took to avoid injury.
2. ———: **INSTRUCTIONS.** In such an action, where the court correctly instructs the jury as to what constitutes negligence and contributory negligence, it is not, in general, erroneous to refuse

instructions directing the attention of the jury to special facts in the case, as demanding greater care than usual.

3. **Damages for Personal Injuries.** Evidence examined, and held to sustain the verdict.

ERROR from the district court of Lancaster county.
Tried below before HALL, J.

T. M. Marquett, J. W. Deweese, and J. A. Kilroy, for plaintiff in error.

Adams & Scott, contra.

IRVINE, C.

Putnam was at work on a public highway which crossed the tracks of the railroad company. He, with others, was engaged in operating a grading machine propelled by twelve horses. He attempted to cross the track of the railroad with that machine, for the purpose of turning it, when a train approaching collided with the machine and horses, throwing the plaintiff to the ground in such manner that, in the language of the petition, plaintiff was "tramped upon, injured, and bruised by said locomotive and cars, and said horses and plow." He sued the railroad company for the personal injuries so received, alleging that the company was negligent in running a special train out of the usual time, at a high rate of speed, and without giving any signal of its approach to the crossing. He recovered a verdict and judgment for \$200, which the railroad company seeks to reverse.

The first contention is that the petition did not state a cause of action, and this contention is based upon the proposition that the petition does not disclose by specific facts pleaded that the plaintiff was himself in the exercise of due care. It is the established law of this state that where the plaintiff proves his case without disclosing negligence on his part, contributory negligence is a matter of defense, the

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burden of proving which is on the defendant. (*Anderson v. Chicago, B. & Q. R. Co.*, 35 Neb., 95; *City of Lincoln v. Walker*, 18 Neb., 244.) If this is true, it follows that unless the plaintiff, by the facts which he pleads, disclose contributory negligence, the defendant by proper pleading must raise the defense. The plaintiff in this case alleged generally that the injury was inflicted upon him without any fault upon his part. This was sufficient. He was not required to plead affirmatively the particular precautions he took, because under the rulings referred to he was not obliged affirmatively to prove them. It was just as much necessary for the railroad company, to make out this defense, to plead affirmatively the facts constituting contributory negligence on the part of the plaintiff, as it was for the plaintiff to plead negligence on the part of the company.

Error is assigned on the refusal of the court to give a number of instructions requested by the company. One of these was a peremptory instruction to find for the defendant, because contributory negligence was shown. We shall consider this subject later. One was a general instruction to the effect that if the plaintiff was negligent in going upon the crossing without looking for approaching trains, then he could not recover. This point was covered by a proper instruction on the question of contributory negligence given by the court of its own motion. All the other instructions requested were specific instructions in regard to the degree of care to be exercised under certain circumstances. A fair sample of these instructions is one to the effect that if the approach to the crossing was obstructed, it was all the more the plaintiff's duty, because of that fact, to ascertain before going upon it whether a train was approaching. It is not always erroneous, and it is sometimes quite proper, for the trial court to direct the attention of the jury to special features of the case which might affect the judgment of a man of ordinary prudence and govern his conduct. But it is doubtful whether error

could be predicated upon the refusal of the court to give such an instruction in any case where by other instructions the test of negligence is properly defined. It has been over and over again decided by this court that even where the facts are undisputed, questions of negligence and contributory negligence are for the jury, where different minds may reasonably draw different conclusions upon the subject. The court here left these questions to the jury, under proper instructions as to what constitutes negligence and contributory negligence, and when the court had told the jury, as it did, that negligence was the absence of such care, forethought, and prudence as, under the circumstances surrounding the case, duty required should be given or exercised, that the statute required the giving of certain signals in approaching the crossing, and that the jury should determine whether the accident was caused by negligence of the railroad company in failing to give such signals; and further, that the plaintiff was required in crossing to use such care as persons of ordinary intelligence and prudence would exercise under like circumstances, this was as far as the court was required to go, and no error was committed in refusing to instruct more specifically. If the instructions asked could have been given without error, it would only be because the facts stated in them left the inferences so free from reasonable doubt that the province of the jury was not interfered with. It is argued that the verdict is not sustained by the evidence, because the uncontradicted evidence disclosed contributory negligence on the part of the plaintiff. This argument is based largely upon the proposition that he did not, before attempting to cross, look along the track for approaching trains. It is not necessary to inquire whether in all cases, or in this particular case, the failure to look for trains before attempting to cross would present a state of facts so conclusive of negligence as to bar a recovery, because the plaintiff testified that before crossing he did look, and saw no train. Under all the

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evidence in the case, we think the court was justified in submitting it to the jury, and in refusing to set aside the verdict.

JUDGMENT AFFIRMED.

MONROE E. SMITH ET AL. V. FIRST NATIONAL BANK
OF CHADRON.

FILED JUNE 18, 1895. No. 5666.

1. **Trial: CONTINUANCE: ABSENCE OF WITNESS.** It is proper to refuse an application to withdraw a juror and continue the case for the purpose of enabling a party to procure the attendance of a witness, when the other party admits the only fact sought to be proved by such witness, except what is cumulative in its character.
2. **Evidence of Value of Stock of Goods.** Where the value of a stock of dry goods was in issue, *held* not to be competent to inquire of a witness not shown to have seen or to know anything in regard to this stock, what proportion of the original cost would represent the value of a stock of dry goods after it had been in a store three months.
3. **Evidence of Records.** The existence of a record must be proved by its production or by an authenticated copy. The non-existence of a record may be proved by the oath of any one who has made a search therefor.
4. **Trial: CORRECTION OF VERDICT.** When a jury returns an incomplete or defective verdict, it is proper for the court to send it back under proper instructions for its completion or correction.
5. **Mortgages to Banks: ULTRA VIRES: COLLATERAL ATTACK.** Where a bank takes a mortgage to secure a debt, a third person cannot attack the transaction or treat the mortgage as void on the ground that it is *ultra vires* of the bank to take such security.
6. **Sales: FRAUD: TIME TO RESCIND.** The vendor of goods, in order to rescind a sale on the ground of fraud, must exercise his election to rescind within a reasonable time after the discovery of the fraud.

ERROR from the district court of Dawes county. Tried below before KINKAID, J.

Spargur & Fisher and Charles B. Keller, for plaintiffs in error.

Albert W. Crites, contra.

IRVINE, C.

This was an action in replevin by the plaintiffs in error, partners doing business as M. E. Smith & Co., to recover the possession of certain goods which, it was claimed, had been obtained from them by C. F. Yates & Co. by fraud, and which had passed into the hands of the First National Bank of Chadron under a chattel mortgage given by Yates & Co. to the bank. The action was brought under the same form of petition and upon the same theory as the cases of *Tootle v. First Nat. Bank of Chadron*, 34 Neb., 863, and *McKinney v. First Nat. Bank of Chadron*, 36 Neb., 629. The case arose out of the same failure, and the general features of the law applicable to the case were settled in those decisions. In this case there was a verdict for the defendant, and judgment thereon, from which the plaintiffs prosecute error.

Two briefs have been filed on behalf of the plaintiffs in error. One of them discusses several questions not raised by any assignment of error, and treats so indirectly the questions presented by some of the assignments that it is very difficult to follow the case from the briefs. Inasmuch as our conclusions lead to an affirmance of the judgment, we shall follow the assignments in the petition in error without regard to the rule that such assignments are waived unless called to the attention of the court by briefs or argument.

It is the theory of plaintiffs that Yates & Co., by statements made to an agent of the plaintiffs, and to Dun's and

Bradstreet's agencies communicated to the plaintiffs, had misrepresented their financial condition. Written statements purporting to come from Yates & Co. were offered in evidence and objected to. Whereupon an application was made to withdraw a juror and continue the cause for the purpose of procuring the attendance of a witness by whom it might be proved that these statements were made by Yates & Co. Thereupon the defendant withdrew objection to the introduction of these statements, and agreed that they might be "deemed as made by Mr. Yates directly." The court then overruled the application for a continuance and this order is assigned as error. The admission made by the defendant supplied all the proof which it was sought to make by the absent witness, except as to the value of the property replevied, and as the plaintiffs had other witnesses on the question of value, the testimony of this witness would only have been cumulative. The court, therefore, did not err in refusing the continuance.

The second and third assignments of error relate to the refusal of the court to permit the introduction of certain testimony in rebuttal as to the value of the property, and to its further refusal to permit the plaintiffs to withdraw their rest and offer such testimony in chief. The question of value, the goods having been delivered to the plaintiffs under the writ, was properly opened by the defense to establish its damages. The plaintiffs, as a part of depositions, relating otherwise to matters in chief, had in their principal case offered some evidence as to value. Notwithstanding this, if the testimony offered on rebuttal had been competent, we would hold that the court should have received it at that time. But it was not competent. The witnesses were not asked as to the value of the goods. It was not shown that they had examined these goods, or knew anything of their character. It was merely shown that they had been engaged in selling dry goods, and "to some extent" were acquainted with the value of such goods.

Then they were asked what would be the value of a stock of dry goods that had been kept in a store about three months, as compared with the original cost of such goods? It was this question to which the court sustained the objection. It was not competent either in chief or in rebuttal. The value of such goods must depend to a large extent upon their character, and the manner in which they have been kept, and to a certain extent on the fluctuations of the market. Expert testimony is always a source of danger, and it would not have done to have permitted these witnesses, simply upon showing that they were to some extent familiar with the value of dry goods, to testify what proportion of the cost would represent the value of certain specific goods, which it was not shown they had seen, and of the condition and nature of which it was not shown they had any knowledge.

The fourth assignment is that the court erred "in striking out the material portion of the deposition of S. V. Pitcher," etc. To questions asked this witness ten objections were sustained. Overlooking the fact that the assignment of error does not call attention to any particular one of these rulings, we have no hesitation in saying that they are all correct. Mr. Pitcher was the county clerk of Sheridan county. One of the representations alleged to have been falsely made by Yates was that he was the owner of certain land in that county. The object of taking Mr. Pitcher's deposition was evidently to show that no land stood of record in Sheridan county in the name of Yates. There is no doubt of the proposition that any person who has examined a record may be permitted to testify that a particular fact does not appear therein. (*Gutta Percha Mfg. Co. v. Village of Ogulalla*, 40 Neb., 775.) But in taking Mr. Pitcher's deposition particular pains seem to have been taken not to make such an inquiry. His attention was called not to the records of his office, but to their index, and, except in one instance, he was asked affirma-

tively for the contents of the index, and not as to the result of a search showing the absence of a certain fact from the record. The questions asked him were what facts the index affirmatively disclosed, and also whether Yates' name appeared as grantor. The first class of questions was objectionable as calling for secondary evidence; the second as being immaterial to the issues. It was immaterial what the record showed in the way of conveyances by Yates. The issue was what he owned at the time of the representations.

The fifth assignment is that the court erred in sustaining an objection to a portion of a paper marked "Exhibit E," attached to the deposition of Monroe E. Smith. We cannot find that any such deposition was offered in evidence. We do find an "Exhibit E" attached to the deposition of Arthur C. Smith, this being a report furnished to Smith & Co. by Bradstreet's agency. The portion excluded does not purport to contain information derived from Yates, but on its face conveys information derived from other sources. Very clearly, Yates was not chargeable with the statement. It was immaterial to the case, and properly excluded.

The sixth assignment is that the court erred in admitting the appraisement made for the purpose of executing the writ of replevin. The appraisers were called as witnesses to the value of the property, and they used the appraisement as a memorandum to refresh their memory. But it was not offered or received in evidence, although it appears attached to the bill of exceptions.

The seventh assignment is that the court erred in giving instructions numbered 1, 2, 3, 4, and 5. The assignment is to the giving of these instructions *en masse*. Some of them are clearly correct, and this assignment must, therefore, be overruled.

The verdict as returned by the jury seems to have left blank the finding of the amount of damages sustained by the bank by reason of plaintiff's detention of the property.

The court then instructed the jury, in writing, specifically how the damages should be assessed, fixing the amount of damages as seven per cent interest on the value of the goods, from the time they were taken under the writ. This instruction was correct, and it was proper for the court, when the jury returned an incomplete verdict, to send the jury back under a proper instruction to correct it.

The ninth assignment is that the court erred "in overlooking plaintiff's motion for a new trial." We presume by this that the pleader meant to write "overruling" instead of "overlooking." The motion for a new trial contains sixteen assignments, and there is, therefore, nothing presented by this assignment calling for specific attention.

The tenth and eleventh assignments are that the verdict was not sustained by sufficient evidence, and that it was contrary to law. On these points counsel argue that the evidence clearly established that the goods were obtained by Yates & Co. by fraud. It is not necessary to consider this question, because, aside from this, the verdict may be sustained on either of two grounds. The first is that two of the notes, to secure which the mortgage of the bank was given, were dated the same day as the mortgage, and the president of the bank testified that the notes were given for "cash advanced." There was no evidence tending to show that these notes were given for an antecedent debt, and if they were given for a loan made at the time the notes and mortgage were executed, the bank was certainly a *bona fide* purchaser of the goods. On this point it is argued that it was *ultra vires* of the bank to lend money on such security. Even if it were, this would not render the mortgage void, and the plaintiffs could not attack it for that reason. The violation of law in this respect does not avoid the transaction, and only the government, by appropriate proceedings, can attack it. This also answers the contention that the security was void because the loan was more than ten per cent of the bank's capital. (*Union Nat. Bank*

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of *St. Louis v. Mathews*, 98 U. S., 621; *Gold Mining Co. v. Rocky Mountain Nat. Bank*, 96 U. S., 640; *Town of Lyons v. Lyons Nat. Bank*, 19 Blatch. [U. S.], 279; *Wyman v. Citizens Nat. Bank*, 29 Fed. Rep., 734; *Mills County Nat. Bank v. Perry*, 72 Ia., 15.) But the verdict may be sustained on another ground. The goods were sold by Smith & Co. to Yates & Co. in March, 1889. The mortgage was made June 5, and the action brought June 14. The rule is that the purchaser must rescind, if at all, within a reasonable time after the discovery of the fraud. It is not claimed that any attempt was made to rescind until the action was brought, and the court properly left to the jury the inquiry as to whether the right was exercised within a reasonable time. The evidence justified the jury in finding that it was not.

JUDGMENT AFFIRMED.

HERBERT E. VAIL, APPELLANT, v. OLIVER S. VAN
DOREN, APPELLEE.

FILED JUNE 18, 1895. No. 6085.

Usury: NOTE: ANTEDATE. When parties contract for the loan of money at the highest rate of interest allowed by the law, and the note or other evidence of indebtedness is made to bear interest from date and is dated at a time prior to that when the borrower receives the money, as a device to cover usury, and the money was not withheld from investment or otherwise set aside for the use of the borrower during the period between the date of the note and the payment of the money, the transaction is tainted with usury.

APPEAL from the district court of Red Willow county.
Tried below before WELTY, J.

The facts appear in the statement of the commissioner.

R. M. Snively and J. S. Phillips, for appellant:

The dating back of a promissory note does not render the transaction usurious. (*Banks v. Antwerp*, 15 How. Pr. [N. Y.], 29; *Muir v. Newark Savings Institution*, 16 N. J. Eq., 537; *Powell v. Jones*, 44 Barb. [N. Y.], 521; *Bevier v. Covell*, 87 N. Y., 50.)

S. R. Smith, *contra*.

IRVINE, C.

This was an action by Vail to foreclose a mortgage made by Van Doren to one G. B. Bell, to secure a note for \$700, dated December 5, 1885, and payable five years after date, with interest at seven per cent, payable semi-annually. Van Doren pleaded usury, and the court found for him on this issue, allowing Vail only his principal less the interest payments which had been made by Van Doren. The plaintiff appeals.

Where usury is the defense, the burden is upon the plaintiff to show that he is a *bona fide* purchaser of the note. (*Wortendyke v. Meehan*, 9 Neb., 221; *Violet v. Rose*, 39 Neb., 660, and cases there cited.) The plaintiff neither pleaded nor proved that he was a *bona fide* purchaser from Bell, so that question is removed from the case. It appears that Van Doren approached one J. W. Dolan, seeking a loan of money. Dolan negotiated the loan, and the evidence clearly sustains the court's finding that in so doing he acted as Bell's agent. At the time the application was made Dolan lent to Van Doren \$200, the money either of Dolan himself or of a bank with which he was connected. Usurious interest, Van Doren testifies, was charged on this \$200, but it may be dismissed from consideration, because the evidence shows that this was not a part of the Bell loan, and was entirely separate therefrom. About three weeks after the application was made the note

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and mortgage were executed and the money paid to Van Doren, Dolan, however, withholding enough therefrom to repay himself the \$200, and also a sum equal to three per cent interest on the \$700 for five years. The evidence shows that the parties contemplated a loan at ten per cent interest, and that the three per cent so withheld in advance was Dolan's commission. It is probable, so far, that nothing in the way of usury appears. (*Pierce v. Davey*, 43 Neb., 45.) But the evidence shows that while the note was dated December 5, 1885, and made to bear interest from that date, the money was not received by Van Doren for three weeks later. The appellant contends that this was because Van Doren had not perfected title to his land, that the money was during that period set apart for the loan, and that its payment was deferred simply on account of Van Doren's failure to perfect his title sooner. It is argued that under such circumstances the antedating of the note did not taint the transaction with usury. Unfortunately for this contention, it is entirely without evidence to support it. The note, we repeat, was dated December 5, the application for the loan made December 7, and Van Doren testifies that he perfected title to his land three days thereafter. Dolan was on the stand and does not contradict this. It nowhere appears that the money was placed at Van Doren's disposal at any time before he actually received it; or that it was withheld from investment elsewhere for the purpose of this loan. On the contrary, it does appear that when the application was made Dolan informed Van Doren that he would have to arrange for procuring the money from the east. In view of this evidence and the finding of the trial court, the only fair inference is that the money was not set apart on the 5th of December, or at any time until the transaction was consummated, and that the antedating of the note was a device to cover usury. The full legal rate of ten per cent having been reserved and the note having been antedated so

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that the full legal rate for five years would be collectible as interest, while the loan would not, in fact, run five years, the finding of the trial court that the transaction was usurious was correct. The fact that only a small excess of interest was reserved does not affect the case.

JUDGMENT AFFIRMED.

ATCHISON & NEBRASKA RAILROAD COMPANY v.
AUGUST BOERNER.

FILED JUNE 18, 1895. No. 6121.

1. **Eminent Domain:** CONDEMNATION PROCEEDINGS: JUDGMENT ON APPEAL. *Atchison & N. R. Co. v. Boerner*, 34 Neb., 240, reaffirmed.
2. ———: ———: ———. Instructions examined, and held not erroneous.

ERROR from the district court of Richardson county.
Tried below before BUSH, J.

T. M. Marquett, J. W. Deweese, and E. W. Thomas, for plaintiff in error.

F. Martin, John Gagnon, and C. Gillespie, contra.

IRVINE, C.

This case was before the court in 1892, when it was reversed and remanded for a new trial. (*Atchison & N. R. Co. v. Boerner*, 34 Neb., 240.) The facts were stated in the former opinion. After the former mandate another trial was had, resulting in a verdict and judgment for Boerner, and the railroad company brings the case here for review.

The principal question argued is the correctness of the former decision, and counsel for the railroad company very frankly state that the case would not be again brought here were it not for their conviction that the former decision was wrong. The court on the former hearing determined that a judgment on appeal from an award of damages in condemnation proceedings is conclusive as to questions actually litigated therein, and as to all matters necessarily within the issues, although not formally litigated; but that the condemnation proceedings and the judgment on appeal therefrom, while they involve all questions of damages caused by the appropriation of that portion of land which was appropriated, and all questions in regard to damage incidentally caused to the remainder of the tract by reason of the appropriation and the proper construction and maintenance and operation of the railroad on the land appropriated, do not involve damages caused to the land by reason of interference with an easement in a public highway by the railway's crossing such highway at some distance from the land. We are satisfied with the conclusions reached on the former hearing, and while we have examined the argument of the railroad company on this point with interest, we do not think that we should depart from the rule already announced in the case. It is not necessary at this time to restate the reasons therefor. We pass on, therefore, to a consideration of the new questions presented on the second trial.

It is assigned as error that the court erred in permitting the plaintiff to prove the value of the property immediately before the construction of the railroad and its value immediately after. This assignment is too general to indicate the precise ruling complained of. Several witnesses testified to the value of the property before the railroad was constructed. All this testimony was objected to, but we think it was clearly admissible as one step in proving the damage. Several questions were asked in different

forms, by which it was sought to show the value after the railroad was constructed. Every objection made to questions of this character was sustained. From the form of the questions we presume that the objections were sustained because the questions did not limit the witnesses to a consideration of the depreciation in value caused by the obstruction of Commercial street at the crossing. At any rate, since the objections were sustained, the railroad company cannot complain.

The following instruction was excepted to: "The jury are instructed that the property of no person can be taken or damaged for public use without just compensation therefor; and if the jury believe from the evidence that plaintiff owned and occupied buildings upon lots 5 and 6, in block 2, of Rulo and Bedard's addition to the city of Rulo, constructed for and suitable for a particular business which the plaintiff was engaged in carrying on therein, and to which the free and uninterrupted use of Commercial street was beneficial, and that the defendant obstructed Commercial street adjoining said property, and that said obstruction made access to said property so difficult or inconvenient as to depreciate the value of said property, that is such a damage as entitles plaintiff to compensation, and your verdict should be for plaintiff in such sum as you believe from the evidence he has been damaged by such obstruction." The first objection to this instruction is because it stated the constitutional provision that property cannot be taken or damaged for public use without just compensation therefor. It is argued that this left the case open to a consideration of all damages whether covered by the condemnation proceedings or not. This is not true, because in several of the instructions given, the court, in the most direct and emphatic terms, informed the jury that they could only consider such damages as the property sustained by reason of the obstruction of Commercial street. It is also argued that the instruction was erroneous because it called

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attention to the business which Boerner had carried on on the property, and allowed damages for injury to that business. But when the instruction is read, it will be observed that it limited the jury to a consideration of the depreciation in the value of the property, because of its being rendered less suitable for the business to which it had been adapted, and by other instructions the jury was told that injury to the business itself could not be considered.

The second instruction was objected to because it was too general in its terms. This instruction was as follows: "The jury are instructed that if they believe from the evidence under the instructions of the court that the plaintiff is entitled to recover in this action, your verdict should be for the plaintiff in such sum as you believe from the evidence his property has been injured or damaged by reason of the obstruction of Commercial street." The instruction certainly was not erroneous in its terms, and a specific instruction in regard to the measure of damages was given at the request of the railroad company itself. The other questions argued were either covered by the former opinion, or relate to questions already incidentally decided. We find no error in the record.

JUDGMENT AFFIRMED.

CITY OF NEBRASKA CITY V. JAMES B. NORTHCUTT.

FILED JUNE 18, 1895. No. 5457.

1. **Municipal Corporations: CHANGE OF GRADE: DAMAGES: TITLE.** In order to recover damages against a city on account of the change of grade of streets, the plaintiff must have either a legal or equitable estate in the property injured.
2. ———: ———: ———: ———. A husband who has erected improvements on the land of his wife, and is in possession thereof, is not entitled to recover in his own name for damages sustained by said property by a change of grade.

ERROR from the district court of Otoe county. Tried below before CHAPMAN, J.

M. L. Hayward and *C. W. Seymour*, for plaintiff in error.

John C. Watson and *E. F. Warren*, *contra*.

IRVINE, C.

This was an action by Northcutt against Nebraska City to recover damages caused by a change of grade. There was a verdict and judgment for the plaintiff, which the city seeks to reverse. The property to which it was claimed the damages accrued was lots 1 and 2, in block 72, and lot 12, in Nebraska City. The answer of the city denies that the plaintiff was the owner of the lots. The only evidence in support of his allegation of ownership was the parol testimony of plaintiff himself that he owned the lots and they stood in his name. As against this the city introduced in evidence the record of a deed showing a conveyance of lot 1 to Katie Northcutt, the wife of the plaintiff. The court instructed the jury as follows: "There being a general allegation in plaintiff's petition that he is the owner of the premises described in his petition, and that he, plaintiff, built and erected the buildings situated thereon, and that he, plaintiff, made the improvements upon said lots, which he alleges have been damaged by reason of said grade, and that he has used, occupied, and controlled said premises for years prior to said grade, claiming to own the same, you are instructed that he can recover for damages caused to said improvements, if you find any damage has been sustained thereby, even if the legal title to one of said lots does appear by the evidence to be in the wife of the plaintiff." The evidence was all directed to the entire damage sustained by the lots, although there was some evidence in relation to the cost of adapting the improvements to the new grade. The instruction as given was

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erroneous. If this judgment should stand and the city pay it, it would be no bar to an action by Mrs. Northcutt to recover damages sustained by lot 1. The fact that plaintiff made the improvements on the lot did not entitle him to recover, unless he owned the improvements or had some estate in them or in the lot. Presumably, the improvements when made became a part of the realty and the property of its owner, and no right of action accrued to the plaintiff because he made them, unless he retained ownership or had some estate in the land; and in the latter case he could only recover for the injuries sustained by his particular estate. In so holding we must not be understood as deciding that one must be the owner of land in fee-simple in order to recover damages for a change of grade. We simply hold that one must have some legal or equitable estate, and that his damages are confined to the injuries done that estate.

Several other questions are argued, but they have for the most part already been determined in other cases. Some have been decided since the trial of this case in the district court. We would, however, in further proceedings, direct attention of counsel particularly to the cases of *Harmon v. City of Omaha*, 17 Neb., 548, and *City of Lincoln v. Grant*, 38 Neb., 369.

REVERSED AND REMANDED.

ROBERT BARR V. STATE OF NEBRASKA.

FILED JUNE 19, 1895. No. 7131.

1. **Criminal Law: CHANGE OF VENUE: DUTY OF CLERK TO TRANSMIT RECORD.** Upon a change of venue in a criminal cause to an adjoining county, the clerk of the court in which the indictment or information was filed must transmit to the clerk of the court to which the venue is changed a certified

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transcript of the proceedings in the case, together with the original indictment or information.

2. **Record for Review: ASSIGNMENTS OF ERROR.** An assignment in a petition in error that the trial court erred in overruling a motion to strike from the files a certain paper cannot be considered where neither such motion, nor the grounds thereof, appear in the record.
3. **Criminal Law: INSTRUCTIONS.** In a prosecution for a felony error cannot be predicated upon the failure of the trial court to define a lesser offense included in the crime charged, unless requested so to do.
4. ———: **ASSAULT: SELF-DEFENSE.** A person who is unlawfully attacked by another in such a manner as to excite in him a reasonable belief that he is in danger of losing his life or receiving some great bodily injury, may use such force to repel the attack as at the time appears to him to be reasonably necessary, although he may be mistaken as to the extent of the actual danger, where other reasonable and judicious men would have been alike mistaken. He is justified in acting, in such case, upon the facts as they appear to him, and is not to be judged by the facts as they actually are.
5. **Conflicting Instructions.** Where the law is incorrectly stated in one instruction, the error is not cured by another instruction which correctly propounds the law upon the same subject.

ERROR to the district court for Cuming county. Tried below before NORRIS, J.

The opinion contains a statement of the case.

C. C. McNish, Brome, Burnett & Jones, for plaintiff in error:

The charge of the court was erroneous in authorizing a conviction for assault and battery without defining that offense. (*Ballard v. State*, 19 Neb., 609; *Milton v. State*, 6 Neb., 136.)

A person is not criminally liable for defending himself against an unlawful assault unless, in repelling such assault, he uses more force than a reasonably prudent person in that situation and under those circumstances would have

believed necessary and essential for his safety. (*Campbell v. People*, 16 Ill., 17; *Schnier v. People*, 23 Ill., 17; *Maher v. People*, 24 Ill., 241; *Shorter v. People*, 2 Comst. [N. Y.], 193; *Lander v. State*, 12 Tex., 462; *Williams v. State*, 3 Heisk. [Tenn.], 376; *State v. Harris*, 1 Jones [N. Car.], 190; *Logue v. Commonwealth*, 38 Pa. St., 265; *State v. Brooks*, 99 Mo., 137; *People v. Pearl*, 76 Mich., 207; *Morris v. Platt*, 32 Conn., 75; *Nalley v. State*, 28 Tex. App., 387; *State v. Reed*, 37 Pac. Rep. [Kan.], 174.)

A. S. Churchill, Attorney General, for the state.

NORVAL, C. J.

An information was filed by the county attorney in the district court of Stanton county, charging the plaintiff in error with the crime of mayhem. On application of the accused the venue was changed to the district court of the adjoining county of Cuming, where he was convicted of an assault and battery on December 12, 1893. A motion for a new trial was duly presented, which was heard and overruled on January 25, 1894, as were also a motion in arrest of judgment and a motion to strike the substituted transcript from the files. An exception was taken to the rulings on each of these motions, and the plaintiff in error was sentenced to pay a fine of \$25 and the costs of prosecution.

Error is alleged in that the court overruled the motion in arrest of judgment. The ground of this motion is that the court below had no jurisdiction of the subject-matter, for the reason that no transcript of the record or proceedings had in the cause in the district court from which the venue was changed had been filed in the district court of Cuming county. Section 456 of the Criminal Code declares: "When the venue is changed to an adjoining county, the clerk of the court in which the indictment was found shall make a certified transcript of all the proceedings in the

case, which, together with the original indictment, he shall transmit to the clerk of the court to which the venue is changed, and the trial shall be conducted in all respects as if the offender had been indicted in the county to which the venue has been changed." If it were true, as contended by counsel for the accused, that no transcript of the proceedings in the district court of Stanton county was filed in the district court of Cuming county until after the verdict had been returned, there could be no room for doubt that the judgment of conviction would be a nullity for want of jurisdiction or power of the court to try and determine the cause, for it is plain that the district court to which the venue in a criminal prosecution has been changed can acquire jurisdiction of the cause only by the filing in the office of the clerk of said court a certified transcript of the proceedings had in the case in the court ordering a change of the place of trial, together with the original indictment or information. It is obvious that jurisdiction of the offense charged in the information could not be conferred upon the district court of Cuming county in any other mode than that pointed out by statute. An examination of the record before us discloses that a true and correct copy of the journal entries in the cause made out by the clerk of the district court of Stanton county and certified under his official seal was, with the original information and all the files and papers in the case, transmitted to, and filed in, the office of the clerk of the district court of Cuming county on the 21st day of November, 1893, which was nearly three weeks before the plaintiff in error was placed upon trial. The objection that the court below was without jurisdiction is not sustained by the record, and the motion in arrest of judgment was properly denied.

It is argued that there was error in the refusal of the court below to sustain the motion to strike from the files the substituted transcript which was filed after verdict. The ruling of which complaint is made cannot be consid-

ered by us, for the reason that neither the motion nor the grounds thereof appear in the record. As stated above, the plaintiff in error was charged with the crime of mayhem, but was convicted of an assault and battery. The trial court in its instructions defined the crime of mayhem, and charged the jury that if they were not convinced of the defendant's guilt of this offense, but were satisfied beyond a reasonable doubt that he was guilty of an assault and battery, they should so find by their verdict. In none of the instructions to the jury was the crime of which the prisoner was convicted defined. It is insisted that this omission is reversible error. A sufficient answer to this contention is that the trial court was not requested to instruct the jury upon that point. The plaintiff in error should have prepared and submitted to the court a request defining the crime of assault and battery, and not having done so, error cannot be predicated upon the failure to so charge the jury. (*Gettinger v. State*, 13 Neb., 308; *Housh v. State*, 43 Neb., 163.)

Exceptions were taken by the plaintiff in error to the giving of the following instructions requested by the state:

"4. The court instructs the jury that if you find from the evidence that the act of maiming was committed by the defendant while he was fighting with the said Perry Kenney, and if you should further find that the said Perry Kenney was the aggressor in said fight and struck the first blow, that even this would not justify the defendant in maiming the said Perry Kenney as charged in the information, unless you should further find that the said Perry Kenney was attempting great bodily injury to the defendant, and that the defendant had no other means of preventing it except by maiming the defendant, and unless you can so find, then it is your solemn duty to convict the defendant of the crime charged in the information, and you should return a verdict of guilty.

"5. The court further instructs you that if you find from

the evidence that the act of maiming complained of in the information in this case was committed by the said Robert Barr in and upon said Perry Kenney in a sudden rencontre between said parties, still this would not justify you in finding said defendant not guilty, unless you should further find from the evidence that the said Perry Kenney was attempting to inflict some great bodily harm upon the said defendant and that there were no other means of preventing it other than maiming said Perry Kenney, and unless you so find from the evidence, it is your duty to find the defendant guilty in manner and form as charged in the information.

"6. The court further instructs you that it is a rule of law that when a person is assailed by an antagonist the person assailed has a lawful right to repel force with force, but when the person assailed uses more force to defend himself than is necessary, or, in other words, uses excessive force, or resorts to acts of violence upon his antagonist not called for in necessary self-defense, he then in law becomes the assailant, and when such unnecessary force is used the party using such force becomes criminally responsible, regardless of the fact as to who was the aggressor in the fight or who may have stricken the first blow."

It is argued that these instructions do not correctly embody the law of self-defense. In *Davis v. State*, 31 Neb., 240, it was held, substantially, that when a person is assaulted by another in such a manner as to excite in him a reasonable belief that he is in danger of losing his life or receiving great bodily injury, he may lawfully resist the attack by employing such reasonable means within his power as are apparently necessary to defend himself. In order to justify self-defense it is not indispensable that there should exist actual and positive danger. A party who is assaulted in such a way as to induce in him a well grounded and reasonable belief that he is in danger of suffering great bodily harm will be justified in defending him-

self, although the danger be not real, but only apparent. In other words, he is justified in acting upon the facts as they appear to him at the time, and is not to be judged by the facts as they actually are. In *Campbell v. People*, 16 Ill., 17, Caton, J., in delivering the opinion of the court, says: "Men, when threatened with danger, are obliged to judge from appearances, and determine by the actual state of things, from the circumstances surrounding them, at least as much as if placed in other and less exciting positions; and it would be monstrous to say that if they act from real and honest convictions, induced by reasonable evidence, they shall be held responsible criminally for a mistake in the extent of the actual danger, where other reasonable and judicious men would have been alike mistaken. A contrary rule would make the law of self-defense a snare and a delusion. It would become but a mockery of the sacred right of self-preservation." This certainly accords with the doctrine upon the subject as declared by the courts of this country. (*State v. Howard*, 14 Kan., 175; *State v. Bohan*, 19 Kan., 28; *Schnier v. People*, 23 Ill., 17; *Maher v. People*, 24 Ill., 241; *Steinmeyer v. People*, 95 Ill., 383; *State v. Brooks*, 99 Mo., 137; *People v. Pearl*, 76 Mich., 207; *Smith v. State*, 26 S. W. Rep. [Ark.], 712; *State v. Cain*, 20 W. Va., 679; *Housh v. State*, *supra*.) The instructions copied above are all faulty and erroneous, in that the jury were told that the defendant could not lawfully use force in self-defense, unless the complaining witness was attempting to inflict upon him great bodily injury, and the defendant had no other means of preventing it, and further, if more force than necessary was used, the defendant was criminally responsible. This, as we have seen, is not the law. It was not necessary that it be shown that great bodily injury was in fact about to be inflicted upon the defendant in order to justify him to repel force by force, but all the law required of him was that he honestly and in good faith believed he was about to receive great bodily

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harm, and that he used no more force to repel the attack than to him appeared to be reasonably necessary. By these instructions, if the jury found that the plaintiff in error used more force than was actually necessary to defend himself, it was their "solemn duty to convict," although they were satisfied from the facts and circumstances detailed by the witnesses that no more force was employed than a reasonably prudent person in that situation would have deemed necessary for his own safety.

It is true that some of the other instructions given by the court correctly stated the law of self-defense. It was not enough, that some of the instructions were correct. They did not cure the errors in the other paragraphs of the charge. Neither this nor the lower court knows but what the jury were guided by the erroneous instructions in finding a verdict of guilty. It is reversible error to give conflicting instructions. (*Warren v. Palmer*, 13 Neb., 376; *Ballard v. State*, 19 Neb., 609.) For the errors indicated the judgment must be reversed and the cause remanded.

REVERSED AND REMANDED.

WILSON LOSURE v. JACOB M. MILLER.

FILED JUNE 19, 1895. NO. 6137.

Review: MOTION FOR NEW TRIAL: SUFFICIENCY OF EVIDENCE.

An objection that the findings and judgment are not sustained by the evidence will not be considered by this court where the record does not disclose that a motion for a new trial, setting up that ground was presented to the trial court and a ruling obtained on the motion.

ERROR from the district court of Knox county. Tried below before ALLEN, J.

Losure v. Thompson.

O. W. Rice and W. L. Henderson, for plaintiff in error.

J. H. Berryman, *contra*.

NORVAL, C. J.

This is an action to recover damages for an alleged malicious prosecution. There was a trial to the court, a jury being waived, with findings and judgment for the plaintiff. The defendant prosecutes a petition in error to this court.

But a single proposition is discussed in the briefs, and that is the evidence in the case is insufficient to sustain the findings and judgment; and this question cannot be considered by this court, for the reason the record fails to disclose that a ruling of the trial court was made upon the motion for a new trial. (*Hull v. Miller*, 6 Neb., 128; *Smith v. Spaulding*, 34 Neb., 128; *Scroggin v. National Lumber Co.*, 41 Neb., 195.) The judgment is

AFFIRMED.

WILSON LOSURE V. BAITY THOMPSON.

FILED JUNE 19, 1895. No. 6138.

Review: MOTION FOR NEW TRIAL: SUFFICIENCY OF EVIDENCE.

In order to review by petition in error the sufficiency of the evidence to support the judgment, a motion for a new trial assigning such ground must be filed in the court below, and its ruling obtained thereon.

ERROR from the district court of Knox county. Tried below before ALLEN, J.

O. W. Rice and W. L. Henderson, for plaintiff in error.

J. H. Berryman, *contra*.

NORVAL, C. J.

This is an action for malicious prosecution. The record in this case is identical with that in *Losure v. Miller*, 45 Neb., 465, and for the reason therein stated the judgment is

AFFIRMED.

FANNIE E. RICHARDS, ADMINISTRATRIX, v. WILLIAM J.
CONNELL ET AL.

FILED JUNE 19, 1895. No. 6051.

1. **Negligence: DUTY OF LOT OWNER TO FENCE DANGEROUS EXCAVATION OR POND.** The owner of a vacant lot upon which is situated a pond of water or dangerous excavation is not required to fence it, or otherwise insure the safety of strangers, old or young, who may resort to said premises not by invitation, express or implied, but for the purpose of amusement or from motives of curiosity.
2. ———: ———: **DAMAGES.** The plaintiff's intestate, a boy ten years of age, who was accustomed to play in and about a pond of water on a vacant lot, the property of defendants, fell from a section of wooden sidewalk which he was using as a raft on said pond and was drowned. *Held*, That the defendants are not liable for damages, and their demurrer to the petition was properly sustained.

ERROR from the district court of Douglas county. Tried below before DOANE, J.

The facts are stated in the opinion.

Breckenridge & Breckenridge and *L. F. Crofoot*, for plaintiff in error, cited: *Barrett v. Southern P. R. Co.*, 27 Pac. Rep. [Cal.], 666; *Penso v. McCormick*, 25 N. E. Rep. [Ind.], 156; *Croghan v. Schiele*, 53 Conn., 186; *Toomey v. Sanborn*, 146 Mass., 28; *City of Indianapolis v. Emmel-*

man, 108 Ind., 530; *Khron v. Brock*, 144 Mass., 516; *Gulf, C. & S. F. R. Co. v. Styron*, 66 Tex., 421; *Powers v. Harlow*, 53 Mich., 507; *Beck v. Carter*, 68 N. Y., 283; *Barnes v. Ward*, 9 M., G. & S. [Eng.], 392; *Hadley v. Taylor, L. R.*, 1 C. P. [Eng.], 53; *Sioux City & P. R. Co. v. Stout*, 17 Wall. [U. S.], 657; *Westerfield v. Levis*, 9 So. Rep. [La.], 52; *Lynch v. Smith*, 104 Mass., 52; *City of Chicago v. Hesing*, 83 Ill., 204; *Hydraulic Works Co. v. Orr*, 83 Pa. St., 332; *Birge v. Gardiner*, 19 Conn., 507; *Keffe v. Milwaukee & St. P. R. Co.*, 21 Minn., 207; *Nagel v. Missouri P. R. Co.*, 75 Mo., 653; *Schmidt v. Kansas City Distilling Co.*, 2 S. W. Rep. [Mo.], 417; *City of Chicago v. Keefe*, 114 Ill., 222; *Village of Carterville v. Cook*, 129 Ill., 152; *Brennan v. City of St. Louis*, 92 Mo., 482.

Connell & Ives, contra, cited: *Klix v. Nieman*, 32 N. W. Rep. [Wis.], 223; *Overholt v. Vieths*, 6 S. W. Rep. [Mo.], 74; *Ratte v. Dawson*, 52 N. W. Rep. [Minn.], 965; *Gillespie v. McGowan*, 100 Pa. St., 144; *McEachern v. Boston & M. R. Co.*, 23 N. E. Rep. [Mass.], 231; *Clark v. Manchester*, 62 N. H., 578; *Pierce v. Whitcomb*, 48 Vt., 127; *Hargreaves v. Deacon*, 25 Mich., 1; *Sweeny v. Old Colony & N. R. Co.*, 10 Allen [Mass.], 368; *Schmidt v. Bauer*, 22 Pac. Rep. [Cal.], 256; *Benson v. Baltimore Traction Co.*, 26 Atl. Rep. [Md.], 975; *Murphy v. City of Brooklyn*, 23 N. E. Rep. [N. Y.], 888; *Nolan v. New York & N. H. R. Co.*, 4 Atl. Rep. [Conn.], 110; *Frost v. Eastern R. Co.* 9 Atl. Rep. [N. H.], 791; *Faris v. Hoberg*, 33 N. E. Rep. [Ind.], 1028; *Thiele v. McManus*, 28 N. E. Rep. [Ind.], 327.

Post, J.

This was an action in the district court of Douglas county by Fannie E. Richards, as administratrix of the estate of George Bertram Weston, deceased, against the city of Omaha, William J. Connell, and William E. Clark. It

was held by the district court, on demurrer interposed by Connell and Clark, that the petition failed to state a cause of action as against them, which is the only ruling assigned as ground for the reversal of the judgment of dismissal as to the defendants named.

The allegations of the petition, so far as they refer to the defendants in error, are, in substance, as follows: On the 29th day of June, 1891, and for a long time prior thereto, said Clark was the owner of lots Nos. 40 and 41, in Hickory Place, an addition to the city of Omaha, and said Connell was during said time the owner of the adjoining premises, described as lot No. 59, in Redick's second addition to said city; that the defendants had for a long time prior to the day named negligently permitted the surface water to accumulate on said lots, thereby creating a deep and dangerous pond, and that they had failed and neglected to fence said lots or to erect barriers of any kind to prevent children, lawfully in the vicinity thereof, from falling into said pond; that said lots are situated in the vicinity of one of the public schools of said city, and the pond aforesaid is not only dangerous to persons passing along South Twenty-fifth street adjacent thereto, but is in a public and much frequented place and attractive to children of tender age, many of whom are accustomed to play about and upon said water; that on said June 29, 1891, the plaintiff's intestate, a boy ten years of age, yielding to the natural impulse of childhood, went on said pond upon a section of wooden sidewalk floating thereon, from which he fell into said pond and was drowned. The language of the petition is somewhat ambiguous, but there is in the brief of plaintiff's counsel no claim that the deceased at the time of the accident was passing along the street or that the fatal result thereof is directly or indirectly chargeable to a proper use of the sidewalk. On the other hand, the construction, in which both parties appear to concur, is that the deceased had constructed a raft of the floating sidewalk,

from which he fell while thus engaged at play on the pond. The petition, we think, fails to state a cause of action against the defendants, and that the demurrers were rightly sustained. The single question presented by the record is whether the owner of a vacant lot upon which is situated a pond of water or a dangerous excavation is required to fence it or otherwise insure the safety of strangers, old or young, who may go upon said premises not by his invitation, express or implied, but for the purpose of amusement or from motives of curiosity. The authorities we find to be in substantial accord, and sustain the proposition that independent of statute no such liability exists.

In *Hargreaves v. Deacon*, 25 Mich., 1, which was an action for the death of the plaintiff's son, a child of tender years, by drowning in a cistern left unguarded, it is said: "Cases are quite numerous in which the same questions have arisen which arise in this case, and we have found none which hold that an accident from negligence, on private premises, can be made the ground of damages, unless the party injured has been induced to come by personal invitation, or by employment which brings him there, or by resorting there as to a place of business or of general resort held out as open to customers or others whose lawful occasions may lead them to visit there. We have found no support for any rule which would protect those who go where they are not invited, but merely with express or tacit permission, from curiosity or motives of private convenience, in no way connected with business or other relations with the occupant."

In *Klix v. Nieman*, 68 Wis., 271, a case quite similar to that before us, it is said, after an exhaustive review of the authorities: "Upon the facts we do not think the law imposed the duty upon the defendant of building a fence or guard to prevent children from reaching the pond; therefore he is not liable for the death of the child."

In *Ratte v. Dawson*, 52 N. W. Rep. [Minn.], 965, an

infant three years of age was by an elder sister taken for recreation to a vacant lot, and accidentally killed by the caving in of an embankment, caused by excavation for sand, which had been left unfenced. In the opinion of the court it is said: "The parties were clearly trespassers. They were not on the premises by plaintiff's invitation or for any lawful purpose. He owed then no duty to fence or guard his premises to prevent them from entering and exposing themselves to danger."

In *Clark v. Manchester*, 62 N. H., 578, it is said: "The plaintiff's intestate was not upon the land of the defendants, where he was drowned, by express or implied invitation, for any purpose. The fact that the ground was uninclosed, and that the deceased and people at their pleasure went there without objection, was not an invitation; and from that fact alone no license can be inferred. The fact that the person who suffered injury and death was an infant child does not change the question nor create a liability against the defendants where none would have existed in case of an injury to an adult person under similar circumstances." And to the same effect see *Overholt v. Vieths*, 6 S. W. Rep. [Mo.], 74; *Gillespie v. McGowan*, 100 Pa. St., 144; *Pierce v. Whitcomb*, 48 Vt., 127; *McEachern v. Boston & M. R. Co.*, 150 Mass., 515; *Gay v. Essex Electric Street R. Co.*, 159 Mass., 238; *Beck v. Carter*, 68 N. Y., 283; *Cooley*, Torts, 606; *Shearman & Redfield*, Negligence, sec. 505.

This class of cases rests upon an entirely different principle from those cases in which the injury resulted from a lawful and proper use of the street or sidewalk adjacent to a dangerous excavation. In the latter cases the law imposes upon the owner or occupant the duty to protect the traveling public, and he will be liable for the consequences of a failure to discharge that duty, while in the former he owes no duty to the general public in that respect. We are referred to a number of cases which counsel argue sustain the plaintiff's right to recover on the facts alleged, and which may be classified as follows:

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1. Cases in which the owner of land has made or permitted a dangerous excavation, embankment, or the like, so near a public highway as to injure one in the rightful use thereof. The principle which underlies this class of cases is, as we have seen, that the owner of land is required to so use it as not to imperil the life or property of another, and are, therefore, not authority in case at bar.

2. Cases in which the defendant has negligently left exposed dangerous machinery likely to attract children and resulting in their injury. Illustrative of this class which constitute a recognized exception to the rule are the so-called turn-table cases.

3. Cases where the plaintiff was injured while upon the defendant's premises by invitation of the latter, and where the negligence consists in a failure to keep such premises in a reasonably safe condition.

But in no case cited has a recovery been allowed on a state of facts substantially like those alleged in the petition under consideration. It follows that the judgment of the district court is right and must be

AFFIRMED.

THOMAS A. STRATTON V. FLORENCE E. DOLE.

FILED JUNE 19, 1895. No. 6100.

1. **Continuance.** An application for continuance is addressed to the discretion of the trial court, and the ruling thereon will not be disturbed in the absence of a clear abuse of discretion.
2. ———: **DEPOSITIONS IN OTHER STATE.** Provisions for the taking of testimony in one state for use in the courts of another, and the enforced attendance of witnesses for that purpose, are founded upon comity, and are, in the absence of express statutory provision to the contrary, extrajudicial as to the courts of the state where such evidence is sought.

3. ———: ———. A continuance will not be granted to enable a party by proceedings for contempt in the courts of Wisconsin to compel a contumacious witness to testify by deposition, there being no presumption that by refusing to answer he is guilty of contempt of any court of that state.
4. **Breach of Promise to Marry: DAMAGES: EVIDENCE OF DEFENDANT'S WEALTH.** In actions for breach of promise to marry, evidence of the defendant's reputation for wealth is admissible, not for the purpose of proving his ability to pay damages, but as tending to show the condition in life which the plaintiff would have secured by a consummation of the marriage contract, although it is not permissible for the plaintiff to particularize the defendant's property.
5. ———: ———: ———. The defendant's mother, at his request, procured the plaintiff to receive him as a suitor, and was otherwise actively engaged in promoting the marriage agreement. *Held*, That communications by the former to the plaintiff, while thus engaged, touching the defendant's property, made as an inducement to the marriage contract, are admissible in evidence in an action against the latter for the breach thereof.
6. **Review: HARMLESS ERROR.** Error not probably conducing to a wrong final decision is no ground for the reversal of a judgment.
7. **Damages for Breach of Promise to Marry: EVIDENCE OF PLAINTIFF'S CHARACTER.** *Held*, Permissible for the defendant to prove specific acts of incontinence on the part of the plaintiff. If guilty of fornication, that fact would be a defense to her action, since personal purity is one of the implied conditions of her agreement. If her actions have been wantonly indelicate and inconsistent with the conduct of a pure-minded woman, that fact is admissible at least in mitigation of damage.
8. **Review: HARMLESS ERROR IN INSTRUCTION.** A judgment will not be reversed for the giving of an erroneous instruction where the verdict is clearly right and the only one which could have been rendered upon the particular issues involved.
9. **Witnesses: IMPEACHMENT.** Evidence set out in the opinion, *held*, admissible for the purpose of impeachment, the necessary foundation therefor having been laid.
10. **Trial: READING DECISIONS TO JURY.** Although the practice of reading to the jury from reported decisions should not be encouraged, the subject is one within the discretion of the trial court and presents no grounds for interference by this court in the absence of an abuse of discretion.

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11. **Arguments of Counsel.** Arguments of counsel based upon facts not in evidence will not justify the reversal of a judgment when the objectionable remarks were evidently made in reply to the argument of the complaining party who was guilty of the first offense in that regard.
12. **Breach of Promise to Marry: JUDGMENT FOR PLAINTIFF: SUFFICIENCY OF EVIDENCE.** Evidence examined, and held sufficient to sustain the verdict and judgment of the district court.

ERROR from the district court of Lancaster county.
Tried below before TUTTLE, J.

E. E. Brown and G. M. Lambertson, for plaintiff in error.

W. R. Starr, J. B. Strode, and R. D. Stearns, contra.

POST, J.

This was an action by the defendant in error, in the district court for Lancaster county, for the breach by the plaintiff in error (defendant below) of an alleged promise of marriage. It is also alleged as a part of the cause of action in the court below that the defendant therein, under promise of marriage, seduced and debauched the plaintiff, to her damage, etc. The answer, while denying the alleged seduction, admits a promise of marriage conditioned that the plaintiff should prove upon inquiry to be a woman of good character and reputation. It is further alleged that the defendant, subsequent to said promise, ascertained that the plaintiff was not a woman of good character and reputation, but that she was, on the contrary, immoral and unchaste, by reason of which he declined to consummate the agreement above mentioned. There was a trial in the district court, resulting in a verdict and judgment for the plaintiff therein, from which the defendant prosecutes proceedings by petition in error to this court.

The first of the errors assigned is the denial of a continuance on the motion of the defendant in order to enable him

to secure the testimony of one Rowley, an alleged material witness. By reference to the defendant's affidavits we observe that he claims to have learned from the plaintiff's own confession on the 31st day of December, 1890, while the agreement was still in force, that she had been criminally intimate with certain persons, including the witness named, and which is the ground upon which he relies for a justification of his refusal. The action, as shown by the record, was commenced in the district court April 27, 1891, and a trial had therein in the month of April, 1892, resulting in a verdict, which was, on the defendant's motion, set aside and a new trial ordered. The motion for continuance above mentioned was made at the September, 1892, term, to-wit, September 20, and the order overruling it bears date of December 9, being the sixty-eighth day of the said term. On the 23d day of August of that year the deposition of said Rowley was taken before a notary public in the city of Racine, in the state of Wisconsin. During said examination the witness was asked whether there had at any time existed criminal relations between himself and the plaintiff, which question he refused to answer, assigning therefor that his relations with the plaintiff were his "own personal business." It was urged in the district court, and which contention is here renewed, that if sufficient time had been allowed for that purpose the defendant could, by means of proceedings for contempt in the courts of Wisconsin, have compelled the witness to answer and that his answers would have established the defense alleged. That an application for continuance is addressed to the discretion of the trial court, and that the ruling thereon will not be disturbed unless such discretion is shown to have been abused, are propositions so firmly established by the decisions of this court as to render a reference to them wholly unnecessary. Rowley, it should be noted, resided in this state continuously from the date of the alleged confession of the plaintiff in December, 1890, until the month

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of September, 1891, yet no attempt was made to secure his testimony until the month of August, 1892; nor had any steps been taken at the time of the overruling of the motion to compel him to answer the questions propounded. The district court evidently regarded the showing of diligence as insufficient to entitle the defendant to a further continuance, and such conclusion cannot be regarded as an abuse of discretion calling for interference by this court. But the district court was apparently influenced by another consideration, and which is of itself a sufficient justification of the ruling assigned, viz., the improbability of securing the evidence sought by resort to proceedings for contempt in the courts of Wisconsin. The law which authorizes the taking of testimony in one state for use in the courts of another state, and which requires the attendance of witnesses for that purpose, is founded upon comity, and is, as remarked by Lyon, J., in *State v. Lonsdale*, 48 Wis., 365, extrajudicial as to the courts of the state where such evidence is sought. It follows that the witness named, by refusing to answer in this cause, is, in the absence of a special statute of Wisconsin, guilty of no contempt of any court of that state. This conclusion is in harmony with the recognized rule as well as the decisions of this court. (See *Johnson v. Bouton*, 35 Neb., 898, and cases cited.)

The plaintiff was permitted, while a witness in her own behalf, to repeat an alleged statement of the defendant's mother relating to his, defendant's, financial standing, and which is assigned as error. In actions of this character evidence of the defendant's general reputation for wealth is admissible, not for the purpose of proving his ability to pay damages, but as tending to show the condition in life which the plaintiff would have secured by a consummation of the marriage contract. (*Kerfoot v. Marsden*, 2 Fos. & Fin. [Eng.], 160; *Kniffen v. McConnell*, 30 N. Y., 285; *Holloway v. Griffith*, 32 Ia., 409; *Bennett v. Beam*, 42 Mich., 346; *Olson v. Solveson*, 71 Wis., 667; *Johnson v.*

Travis, 33 Minn., 231; *Hunter v. Hatfield*, 68 Ind., 422.) But it is not as a rule permissible to particularize the defendant's property. As said in *Kerfoot v. Marsden*, *supra*: "You may ask in a general way as to the defendant's property, but you cannot go into particular items as to his property." (See, also, *Kniffen v. McConnell*, *supra*; *Chellis v. Chapman*, 125 N. Y., 214.) Our first impression was that the admissions of the declarations mentioned was error requiring a reversal of the judgment; but a second reading of the record has convinced us that this is not a case for the application of the general rule, in view of Mrs. Stratton's relation to her son, the defendant, and the conspicuous part taken by her in promoting the marriage contract. The evidence bearing upon this aspect of the case is free from conflict and may be summarized as follows: About the 14th day of October, 1890, the plaintiff then residing with her parents in Red Willow county and engaged in teaching school in an adjoining district, received a letter from Mrs. Stratton inquiring if she was married or engaged, and soliciting an answer, saying that she, plaintiff, might hear something to her advantage. This communication was followed by a second and third within the period of a month. In the second, the writer mentioned the fact that her son, the defendant, had recently broken an engagement with a young woman in Iowa to whom he had been engaged, and that she, Mrs. S., would like to have him call on the plaintiff during a visit he was then contemplating to that part of the state. The third letter was to advise plaintiff of the date set for the defendant's visit. In one of the letters mentioned the writer referred to her friendship for the plaintiff resulting from a previous acquaintance, saying that her son thought a great deal as she did, and would like a girl whom she admired. The plaintiff accordingly, on the 14th day of November following, received the defendant as a suitor at her home, and which was the beginning of their personal

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acquaintance. During that visit of two days the engagement in question was made and the defendant at his request was received by plaintiff's parents as her affianced husband. After returning to his home in Lancaster county, near the city of Lincoln, he addressed the plaintiff a letter under date of November 18, in which he used this language. "Mother was surprised as well as glad when she heard of our engagement. She did not realize how much in earnest I was when I requested her to write to you." On the 29th day of December, following, the plaintiff, at the request of Mrs. Stratton, visited the latter at her home and remained until the evening of January 2. Further reference will be made to that visit in this opinion, but for the present it suffices that there was subsequently no personal communication between the plaintiff and the defendant or his mother. Returning to the examination of the plaintiff as a witness, we observe that after testifying to the engagement she was interrogated as follows:

Q. Did you learn anything of his financial condition prior to his coming to your house?

A. Yes, sir.

Q. Through whom?

A. Through his mother, his brother-in-law, and sister.

Q. What, if anything, did you learn through his mother as to his financial condition?

Objected to, as incompetent and hearsay. Overruled. Exception.

A. I learned that he had property in the city of Lincoln and that he also had 160 acres of land lying northeast of the city. She said they owned a half-section all together, that is, Mr. Stratton senior and Mr. T. A. Stratton, but that T. A. Stratton's property was worth more than the others, and she estimated the property at about \$300,000, as near as I can remember.

The plaintiff had just been examined regarding the contents of Mrs. Stratton's letters, and the utmost that can be

claimed by defendant for the evidence quoted is that we are left in doubt whether it refers to the written correspondence or to information previously communicated to the witness, a doubt which is not removed by the other evidence in the record. Prior to December 29, 1890, the plaintiff had met Mrs. Stratton on one occasion only, viz., during a four weeks' visit at the home of a common relative in Hitchcock county. It is not shown that the amount of the defendant's property or that of his mother was referred to during that visit, nor are we at liberty to presume that Mrs. Stratton at that time confided to a comparative stranger, in whom she had no interest, the financial standing of herself or her son, rather than on the subsequent occasion when actively encouraging the suit of the latter for the plaintiff's hand. It is a rule of universal application that all presumptions are in favor of the judgments of courts of general jurisdiction and that one seeking a reversal on the ground of alleged error is required to exhibit the record showing affirmatively that the ruling complained of is not merely erroneous, but also probably prejudicial to his rights. The reasonable inference being that the communication touching the defendant's property was by means of the written correspondence conducted at his request and as an inducement to the marriage contract, it was admissible in evidence and the court did not err in receiving it.

Albert Dole, the plaintiff's father, who was a witness in her behalf, referring to a conversation with the defendant, in which the latter solicited the witness' consent to the proposed marriage, testified as follows:

Q. State what he said.

A. I think he told me at that time that they had a half section within two miles of the Lincoln post-office, and half of it was in his name and the other half in his father's or mother's name; that is the best of my recollection now. And I was wanting to know, curiously, what the property was worth so near the city, so I quizzed him something

about it and solicited the information from him that it was worth a good deal of money, but it was all in lots, or about all in lots.

Q. Did you make any estimate from his representations as to what property he had?

Objection to the witness giving any estimate he made overruled and defendant excepts.

A. As near as I can remember he estimated to me so that I figured out his land, what he had left, was worth about \$500 per acre from the lots he had sold. He told me he had sold a few lots off the piece. I don't remember how many.

Q. Off what piece?

A. Off his quarter section, and in platting it it was worth about \$500 per acre; something like that.

It is contended that the overruling of the foregoing objection was prejudicial error. Counsel do not attempt a defense of the above ruling in this court, and we assume that it cannot be successfully defended. But is the error prejudicial, calling for a reversal of the judgment? It will be observed that although the question embraces all of the defendant's property, the answer is confined to a particular tract of land; and while the first sentence thereof might warrant the inference that the value mentioned was merely the estimate of the witness, the answer as a whole, in connection with the succeeding one, points unmistakably to the defendant's own estimate rather than that of the witness. We are, after repeated examinations of this part of the record, unable to determine that the ruling under consideration was prejudicial to the defendant. It is not sufficient, as elsewhere stated, that an erroneous ruling may possibly be prejudicial, and that errors not probably conducing to a wrong final decision will be disregarded by the appellate court. (*Vide Elliott, Appellate Procedure, 539, 632.*) True, the jury might have construed the language quoted as referring to the estimate of the witness only, but

such a construction is neither the natural or probable one and will not therefore be presumed by this court.

It was sought by John Paul and other witnesses to impeach the plaintiff's character by proving that she was reputed to be unchaste in the neighborhood of her home, and the following question was excluded on her objection during the examination in chief of the witness named: "Is there anything you know of your own personal knowledge, other than what you have told, relative to her improper conduct?" It was certainly permissible for the defendant to show specific acts of incontinence on the part of plaintiff, whether committed before or subsequent to the marriage contract. If she had been guilty of fornication, that fact would have been a complete defense, since personal purity was one of the implied conditions of her agreement. If she had been guilty of acts wantonly indelicate and inconsistent with the conduct of a pure-minded woman, that fact was admissible at least in mitigation of damage. (*Willard v. Stone*, 7 Cow. [N. Y.], 21; *Palmer v. Andrews*, 7 Wend. [N. Y.], 142; *Williams v. Hollingsworth*, 6 Baxt. [Tenn.], 12; *Cole v. Holliday*, 4 Mo. App., 94.) But we cannot say that the ruling on that question, although erroneous, is prejudicial to the defendant, for the reason that no offer was made from which the court could determine that the evidence was material to the issues of the case. It has been frequently held that such an offer is necessary as a basis for review by petition in error. (*Masters v. Marsh*, 19 Neb., 458; *Hamilton v. Ross*, 23 Neb., 630.)

Exception was taken to the giving of one paragraph of the charge of the court as follows: "With respect to the absolute contract to marry, damages for its breach, and the aggravation thereof by the alleged seduction, you are instructed that the burden of proof is upon the plaintiff to maintain the same by a preponderance of evidence. And with respect to the alleged conditional promise to marry

upon ascertaining the good reputation and character of the plaintiff, the burden is upon the defendant to maintain the same by a like preponderance of evidence." It is said by counsel for defendant that "the burden was upon the plaintiff to establish an unconditional promise, or if there was a condition, that it had been complied with on her part. So plain and just a proposition needs no authority to maintain it." But the question of the soundness of the proposition stated in the instruction we regard as wholly immaterial, since the allegation of an unconditional promise is conclusively established by the proofs. Indeed, were that the only issue in the case, the court might with propriety have directed a verdict for the plaintiff. The evidence upon which this conclusion rests is the numerous letters of the defendant, beginning with that of November 18 above referred to. To set out that correspondence at length would be without profit to the parties hereto or the profession. It is sufficient to say that they abound in expressions of the tenderest regard for the plaintiff and solicitude for health which was somewhat impaired by recent illness. On November 29, referring to certain presents that day sent her, he wrote: "The photo and album are a birthday present, but the ring I hope you will accept as having more significance." And on December 13, referring to her acknowledgment of the letter above mentioned, he wrote, "How glad I was to hear that you had received the little presents all right, and a thousand thanks for accepting the ring in the way you did." Again, on December 18 he wrote in reply to an inquiry by the plaintiff, "In reference to the dress you expect to wear on the day I look forward to that will make me the happiest man on earth, I am satisfied to leave that to your own good judgment." It would be discrediting the defendant's intelligence to permit him to say, in the face of these and many like expressions, that, by the terms of his contract with the plaintiff, he then had under consideration the question of her chastity.

The foregoing observations lead naturally to a consideration of the visit of the plaintiff to defendant's home on the invitation of his mother. Her reception by the latter as well as by the defendant was of the most cordial kind and she appears to have been at once accorded the position of prospective wife and daughter, although the relations of the parties named at the termination of her visit, four days later, is a subject upon which the evidence is irreconcilably conflicting. A statement of the contentions of the parties with respect to this branch of the case is deemed sufficient without even a summary of the evidence. The defendant, as we have seen, contends that on New Year's the plaintiff confessed to him her past criminal relations with the witness Rowley and others, and which fact he confided next day to his mother, to whom, it is claimed, a like confession was made. The alleged confession is, as may be inferred, denied by the plaintiff, who testifies that the defendant, after she had retired on the night in question, entered her room when, as she claims, her seduction was accomplished. There is about the story of each that which suggests the propriety, if not the necessity, of corroboration. But the issue thus presented was by the jury determined in favor of the plaintiff, and the verdict, like other findings based upon conflicting evidence, is conclusive. We find, however, in the subsequent correspondence of the parties much which tends directly to corroborate the plaintiff and to contradict the defendant. For instance, on January 3, the day after her departure from Lincoln, the plaintiff addressing defendant from Indianola, wrote:

"DEAREST AL.: I arrived here safely and feel very well under the circumstances. * * * Darling, there is a place in my heart no one but you can fill, and I realize the fact more and more all the time. However, I am going to be brave and cheerful, and wait until the time comes when we shall not be separated. I cannot help but worry about your mother. I fear there is more the matter with her than

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she is willing to admit. I don't imagine this letter will seem very cheerful to you, but I do feel so worried about her that I can't help expressing it. * * * Write immediately so that I may know. I have had so much attention from you for the past week that I miss it now. * * * Give my love to your mother."

The foregoing was followed by letters on the 11th and 19th of the same month, in each of which reference is made to their mutual affection and contemplated marriage. From the last we quote the following: "I have all the confidence in you imaginable, for I know you would not have confided in me as you did if you had not thought me worthy of your undivided love, and you may be sure no gentleman will be of much importance this winter. I do not intend to go with them any more than if we were married, for I think it just as wrong as it will be later." The defendant, replying to the letter of January 2, addressed the plaintiff "Dear Eva," and, after some suggestion of medical treatment for her, adds, "I am sure your father and mother will concur with me, and I assure you my motives are the best, for I would write this if I never expected you to become my wife." Again, on the 15th, after addressing her as "My Darling Girl," he wrote: "How I would enjoy that talk, for I am just as lonely without you as a man can be. * * * Why could we not write our love talks on separate slips of paper and write only sober business talk in our letters proper?" These communications afford unmistakable evidence of the relations of the parties on and prior to the date last above mentioned, and are, to say the least, radically inconsistent with the claim that the defendant had before that time learned from the plaintiff's confession of her illicit relations with other men, including his own sister's husband.

Mrs. Stratton, defendant's mother, who was a witness in his behalf, testified on her examination in chief that while driving from her home to Lincoln in company with the

plaintiff on the morning of January 2 the latter repeated the confession alleged to have been made to the defendant, which included criminal relations with the said Rowley and the witness' son-in-law, Harvey Gunder, only. On cross-examination she was, in substance, asked if she had not on a day named stated to Mr. Starr in front of Opelt's hotel in the city of Lincoln that the alleged confession was made at her home in the presence of her son, and if she did not in said conversation further state to Mr. Starr that the plaintiff during said confession admitted having led an immoral life ever since she was old enough, and that she had been criminally intimate with men generally, including a man then residing in Lincoln. The witness having answered in the negative the plaintiff was permitted to call Mr. Starr for the purpose of impeachment, and who, over the defendant's objection, testified that she had, in a conversation at the time and place named in the foundation question, used the language therein imputed to her. Although the ruling of the court in the admission of that evidence is vigorously assailed by counsel for the defendant, we are unable to say that it is error. It is true that a witness who has been cross-examined on matters collateral to the issues cannot, as to such examination, be afterwards contradicted by other witnesses. But the alleged confession was not a collateral issue of the case. If the witness had previously made statements concerning the admissions of the plaintiff so radically different from her version thereof at the trial, that fact was admissible as bearing upon the question of her credibility. To the trial court is committed some discretion in prescribing the limits at the cross-examination, whether for the purpose of impeachment or otherwise, and in the absence of a clear abuse of that discretion its rulings will not be reviewed by this court.

Finally, it is argued that the district court should have set aside the verdict on account of the misconduct of the plaintiff's attorney "in reading to the jury and commenting

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upon a decision of the supreme court of Massachusetts." From the evidence in the bill of exceptions it appears that defendant's attorney in his argument to the jury stated, in substance, that the case on trial was the first of its kind ever brought in Lancaster county, that not a dozen cases of the kind had ever been tried in the state of Nebraska, and but one or two of such cases had ever reached the supreme court. The reason he said that so few cases of the kind were brought is that a woman of fine sensibilities would not sue for damages for the breach of a contract to marry, that such causes are not meritorious and should not be looked upon with approval. Afterward plaintiff's attorney during the closing argument was proceeding to read from notes when interrupted with the objection that the paper from which he was reading was "a copy of a legal decision," which objection was overruled and an exception taken by the defendant. The decision in question is *Wightman v. Coates*, 15 Mass., 1, and so much thereof as read to the jury is a defense of the action for breach of promise to marry, and appears to have been intended as an answer to the argument of defendant's attorney. The practice in this case is certainly not to be commended, but, like other matters pertaining to the trial, it is within the discretion of the court and will not be made the ground of reversal in the absence of probable prejudice to the complaining party. The objection, it will be observed, does not include the matter of the opinion, but goes no further than the question of practice, and therefore presents no question for review by this court. Another answer to this conclusion is that defendant's attorney was the first to offend and will not be heard to complain of remarks outside of the record in reply to his argument. (*Miner v. Lorman*, 66 Mich., 530.) The judgment of the district court will accordingly be

AFFIRMED.

FRED SHELLENBERG V. FREMONT, ELKHORN & MISSOURI VALLEY RAILROAD COMPANY.

FILED JUNE 19, 1895. No. 5656.

1. Carriers of Goods: BAILMENT: RIGHTS OF OWNER OF GOODS.

The rightful owner of personal property in the possession of a common carrier or other bailee may enforce his right thereto, although a stranger to the contract of bailment.

2. ———: REFUSAL TO SURRENDER GOODS TO OWNER: CONVERSION.

The refusal of a common carrier to surrender goods in its possession to the rightful owner amounts to a conversion, for which the latter may recover if entitled to possession at the time of his demand therefor.

3. Interpleader. Whatever may have been the imperfections of the former practice, the remedy of the bailee under the system by proceeding in the nature of a bill of interpleader, thus requiring the several claimants of property to litigate the question of title between themselves, is ample and complete.

ERROR from the district court of Madison county. Tried below before ALLEN, J.

See opinion for statement of the case.

Wigton & Whitham, for plaintiff in error:

The plaintiff in error claims the title to the potatoes never passed from him, and that the delivery was inadvertent on his part, made with the expectation that payment would be made in cash on delivery; that when a sale is made for cash the delivery and payment of the consideration are both necessary to pass title.

When goods are sold for cash, payment is a condition precedent to the passing of title, unless payment is waived, and this is true whether there was fraud in obtaining possession or not. In such case where payment is not made, the seller may recover possession of goods delivered by re-

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plevin, or an action of conversion will lie. (*Wabash Elevator Co. v. First Nat. Bank of Toledo*, 23 O. St., 311; *Russell v. Minor*, 22 Wend. [N. Y.], 659; *Allen v. Hartfield*, 76 Ill., 358; *Dows v. Kidder*, 84 N. Y., 121; *Tyler v. Freeman*, 3 Cush. [Mass.], 261; *Adams v. O'Conner*, 100 Mass., 515; *Solomon v. Hathaway*, 126 Mass., 482; *Kenney v. Ingalls*, 126 Mass., 488; *Hodgson v. Barrett*, 33 O. St., 63; *Mathews v. Cowan*, 59 Ill., 341; 5 Wait, *Actions & Defenses*, 581, 584, 585; *Daugherty v. Fowler* 25 Pac. Rep. [Kan.], 40; 1 Benjamin, *Sales* [6th Am. ed., rev. 1889], secs. 335, 350; *Acker v. Campbell*, 23 Wend. [N. Y.], 372; *Hutchinson, Carriers*, secs. 404-408; *The "Idaho"*, 93 U. S., 575; *Miller v. Woods*, 21 O. St., 485; *Bridge v. Bachelder*, 9 Allen [Mass.], 394.)

John B. Hawley and B. T. White, contra:

Being a stranger to the contract, plaintiff could not demand, nor was the defendant bound to make delivery of the property to him, except upon legal process, particularly as he was given an opportunity to protect his rights by such process. (*Sioux City & P. R. Co. v. First Nat. Bank*, 10 Neb., 556; *Gulf, C. & S. F. R. Co. v. Freeman*, 16 S. W. Rep. [Tex.], 109; *Houston & T. C. R. Co. v. Adams*, 49 Tex., 761.)

The title to the property passed with delivery. The charge of fraud is without evidence to support it. (*Tiedeman, Sales*, sec. 208; *Sutro v. Hoile*, 2 Neb., 186; *Haskins v. Warren*, 115 Mass., 514; *Warder v. Hoover*, 51 Ia., 491; *Cole v. Berry*, 42 N. J. Law, 308; *Smith v. Lynes*, 5 N. Y., 41; *Thompson v. Wedge*, 7 N. W. Rep. [Wis.], 560; *Perkins v. Lougee*, 6 Neb., 220; *Lumpkin v. Snook*, 63 Ia., 515; *Sheldon v. Davidson*, 55 N. W. Rep. [Wis.], 161; *Runge v. Brown*, 23 Neb., 817; *Faulkner v. Klamp*, 16 Neb., 174; *First Nat. Bank v. Yocum*, 11 Neb., 328; *Johnson v. Bent*, 9 So. Rep. [Ala.], 581; *Hedman v. Anderson*, 6 Neb., 392.)

J. B. Barnes, also for defendant in error.

POST, J.

This was an action in the district court for Madison county by the plaintiff in error to recover from the defendant in error for the conversion of a car load of potatoes. On the conclusion of the plaintiff's case the district court directed a verdict for the defendant, to which exception was taken, and judgment having been entered thereon, the cause has been removed into this court for review by means of a petition in error.

It is shown by the evidence in the bill of exceptions that about October 9, 1890, the plaintiff agreed to sell to one Day a car load of potatoes, to be delivered at Hoskins, a station on the Chicago, St. Paul, Minneapolis & Omaha railway, in Wayne county. At the time mentioned the plaintiff requested Day to pay some money on the potatoes to insure his taking them, to which the latter replied that he had already sold them and would have to take them. October 13 said Day drew a check in favor of the plaintiff or order, bearing date of October 17, on the First National Bank of Deadwood, South Dakota, for \$375, the contract price of the potatoes, and informed the latter that it would be cashed by the Norfolk National Bank in the city of Norfolk. The car containing the potatoes, which was then on the side track ready for shipment, was by Day immediately consigned to the First National Bank of Deadwood, at Whitewood, South Dakota, the western terminus of the defendant's line of road. A bill of lading for the potatoes was delivered by the railroad company to Day, to which the latter attached a sight draft, drawn in his own favor, and forwarded it to the consignee bank for collection, but the drawee therein named having refused to pay the draft upon presentation, the bank, in the language of the cashier, "refused to have anything to do with the

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potatoes." October 15, the Norfolk bank having refused, on presentation thereof, to cash the check drawn by Day to the plaintiff's order, the latter served the defendant, to whom the said car had in the meantime been delivered as a connecting carrier, with written notice to the effect that the potatoes mentioned had been procured by said Day through fraud and false representations, and demanded that they be held by the defendant subject to his, plaintiff's, order. Previous to the receiving of said notice the potatoes in controversy had been forwarded from Norfolk by the defendant company, and were then some place between said city and the point of their destination. October 18 the check above mentioned, which had, at plaintiff's request, been forwarded to the Deadwood bank for collection and return, was protested for non-payment. October 23 plaintiff, by his attorney, tendered to the defendant's agent at Whitewood the amount of its charges, including charges for unloading and storing, and demanded the potatoes, which demand was refused unless the plaintiff would surrender the bill of lading therefor.

The single question presented is whether the defendant, as a common carrier of property, was bound at its peril to determine which of the rival claimants of the property was the rightful owner. It was formerly held that where a bailee of goods delivered them to the rightful owner, he would, notwithstanding that fact, be answerable to the bailor without title thereto. The reason for the rule was that a bailee, having recognized the bailor as the owner, should not be permitted to dispute the latter's title; but according to the modern rule as recognized in this country and in England, it is a sufficient excuse for the non-delivery of personal property for the bailee to show that he has surrendered it to the rightful owner. (*Hutchinson, Carriers*, 404; *Western Transfer Co. v. Barber*, 56 N. Y., 544; *Harker v. Dement*, 9 Gill [Md.], 7; *Hardman v. Willcock*, 9 Bing. [Eng.], 382; *Cheesman v. Exall*, 7 Exch. [Eng.],

341; *Wells v. American Express Co.*, 55 Wis., 23; *American Express Co. v. Greenhalgh*, 80 Ill., 68; *Wolfe v. Missouri P. R. Co.*, 97 Mo., 473; *The "Idaho,"* 93 U. S., 575.) The reasoning upon which the modern doctrine rests is that the obligation of the bailee is to restore the property or to account for it, and that he has in legal contemplation accounted for it when he has delivered it to one whose title and right of possession is paramount to that of his bailor. He may, in brief, if he choose, yield possession to a stranger claiming the property, by taking the risk of establishing the title thus recognized. It is well established that a delivery of goods to the consignee before the carrier is made aware of the rights of a rival claimant thereto, as a complete extinguishment of its liability, although such claimant may be in fact the rightful owner (*Sheridan v. New Quay Co.*, 4 Com. B. [Eng.], 93; *Hutchinson, Carriers*, 408), since, as remarked by the author last cited, any other rule would be an "intolerable hardship upon the carrier."

On the question of the duty of a common carrier or other bailee at its peril to determine between the bailor and a third party claiming title, the authorities are less numerous than the importance of the subject would seem to suggest, although the pronounced weight thereof sustains the proposition that a refusal to surrender to the rightful owner amounts to a conversion, for which the latter may recover if entitled to possession at the time of his demand. In *Wells v. American Express Co.*, 55 Wis., 23, a well considered case, Judge Orton, after asserting the liability of the carrier, says: "This principle obtains in all cases of bailment, and the *jus tertii* may be enforced even as against the contract of bailment, and when enforced, will be made available to excuse and protect the bailee from the performance of delivery according to its terms, and it is founded in reason as well as sustained by a great preponderance of authority. There can be no distinction between its application in case the bailor or consignor seeks to reclaim the

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property from the bailee or carrier and in case the consignee seeks its delivery, for the rights of all the parties to the contract must yield to the paramount right of the real owner of the property." It is also said in the same opinion: "When the liability of the express company to respond to the claim of a third person as the exclusive owner of the property against the terms or directions of the consignment for delivery to another, or for delivery to himself and another, is established by law as now seems clear, it follows that such third person should recover in an action against the company upon proof of his ownership." The proposition there asserted finds support in the following authorities: *Western Transportation Co. v. Barber*, 56 N. Y., 544; *The "Idaho"*, 93 U. S., 575; *Hutchinson, Carriers*, 406, 407. We have been referred to a single case at variance with the above doctrine, viz., *Kohn v. Richmond & D. R. Co.*, 16 S. E. Rep. [S. Car.], 376, in which, with one judge dissenting, the liability of the defendant was denied. The reasons upon which that case rests are shown by the following quotation: "It seems to us that common justice would require that such burden should be assumed by the claimant, who is most likely to have the means of meeting it, and not upon the carrier, who cannot be supposed to know anything about the real ownership of the goods, and had a right to assume that the person from whom he received possession of the goods was such rightful owner, possession of personal property being evidence of title." There is no doubt that the assertion of conflicting claims has been the occasion of frequent embarrassment to bailees, particularly common carriers, who are bound to receive goods offered for transportation, although there has been suggested no sufficient reason for excepting them from the operation of the rule by which the rightful owner is permitted to reclaim property wherever found. We are aware of exceptions to the rule, but they rest upon equitable considerations, none of which are presented by the record in

this case and need not, therefore, be noticed; but whatever may have been the embarrassment and inconvenience of the bailee under the former practice, his remedy under our system, by an answer in the nature of a bill of interpleader, thus making the adverse claimant a party to the controversy, and requiring such claimants to litigate the question of title between themselves, is ample and complete. It follows that in directing a verdict for the defendant the district court erred, for which the judgment must be reversed and a new trial awarded.

REVERSED.

LUCRETIA CASE V. IDA CASE.

FILED JUNE 19, 1895. No. 6189.

1. Slander: DAMAGES: ALIENATION OF HUSBAND'S AFFECTIONS.

The alienation of the affections of a husband or wife and loss of home and support, which are proved to result from the circulation of slanderous reports, charging the injured party with the commission of the crime of adultery, are such natural and probable consequences of the reports as to constitute them proper elements of damages in an action of slander by such party against the slanderer.

- 2. Instructions.** It is error for the court to refuse to give an instruction requested by a party to an action, which is pertinent and applicable to one branch of the case which the court has not covered in its charge to the jury, unless it is clear that such refusal could not have prejudiced the party by whom the instruction was tendered.

ERROR from the district court of Saunders county. Tried below before WHEELER, J.

The opinion contains a statement of the case.

George W. Simpson and *J. E. Frick*, for plaintiff in error:

The motion to strike out certain portions of the petition should have been sustained. (*Georgia v. Kepford*, 45 Ia., 48; *Beach v. Ranney*, 2 Hill [N. Y.], 309; *Terwilliger v. Wands*, 17 N. Y., 62; *Sedgwick, Damages*, sec. 444.)

S. H. Sornborger and *J. R. Gilkeson*, *contra*, contending that the motion was properly overruled, cited: *Chesley v. Thompson*, 137 Mass., 136; *Adams v. Smith*, 58 Ill., 417; *Marble v. Chapin*, 132 Mass., 225; *Mahoney v. Belford*, 132 Mass., 393; *Swift v. Dickerman*, 31 Conn., 258; *Dufort v. Abadie*, 23 La. Ann., 280; *Boldt v. Budwig*, 19 Neb., 739; *Hardin v. Harshfield*, 12 S. W. Rep. [Ky.], 779; *Adams v. Smith*, 58 Ill., 417.

HARRISON, J.

This is an action commenced by defendant in error (hereinafter referred to as "plaintiff") to recover damages of plaintiff in error (hereinafter called "defendant") on account of alleged slanderous statements made by defendant in reference to plaintiff. It appears from the evidence that the plaintiff and defendant, at the time of the occurrence upon which this suit was founded, bore the relationship of daughter-in-law and mother-in-law. The petition states that plaintiff was married to Oscar G. Case December 30, 1875, and that she was his wife at the date of the alleged slanderous remarks and at the commencement of the action; that on the 3d day of May, 1889, the defendant, in the presence and hearing of divers persons, falsely and maliciously spoke and published of and concerning the plaintiff that she had been unchaste before her marriage, had become pregnant, and that she had a miscarriage on the evening of the wedding day, and further, that the plaintiff's first child, which was born more than a year after the marriage, was begotten by one Dr. Buck, a man other than plaintiff's husband; that "by reason of the publication and utterance of said false and malicious words

by the defendant the affections of plaintiff's said husband were and are alienated, her domestic peace and happiness are destroyed, and plaintiff has been deprived of her home, her means of support, her peace of mind, and her bodily health, and that she is damaged in her reputation, to her damage in the sum of \$3,000." In the second cause of action it is stated that the defendant accused plaintiff of being at a neighbor's house "on a whoring scrape," or "committing adultery;" that "by reason of the utterance and publication of said false and malicious words by the defendant the affections of plaintiff's said husband were and are alienated, her domestic peace and happiness are destroyed, and plaintiff has been deprived of her home, her means of support, her peace of mind, and her bodily health, and that she is damaged in her reputation, to her damage in the sum of \$3,000." In the third count of the petition it is stated that defendant charged plaintiff with adultery committed with a man in the employ of the husband, and with living with the hired man in a state of adultery, and that the husband caught the plaintiff and employe in the act of adultery, and concludes that "by reason of the speaking and publishing of said false and malicious words by the defendant the affections of plaintiff's said husband were and are alienated, her domestic peace and happiness are destroyed, and plaintiff has been deprived of her home, her means of support, her peace of mind, and her bodily health, and that she is damaged in her reputation, to her damage in the sum of \$4,000." The following motion was filed by defendant:

"Comes now the defendant and moves the court to strike out of the first cause of action in the plaintiff's petition the words following, to-wit, commencing on the twenty-fourth line of the said first cause of action: 'The affections of plaintiff's said husband were and are alienated, her domestic peace and happiness are destroyed, and plaintiff has been deprived of her home and means of support,' for the

reason that the same are redundant, immaterial, and irrelevant.

"2. We further move the court to strike out of the second cause of action of plaintiff's petition, commencing on the tenth line thereof, the following words, to-wit: 'The affections of plaintiff's said husband were and are alienated, her domestic peace and happiness are destroyed, and plaintiff has been deprived of her home, her means of support,' for the reason that the same are redundant, immaterial, and irrelevant.

"3. We further move the court to strike out of plaintiff's petition the following words, to-wit, commencing on the fourteenth line of the third cause of action: 'The affections of plaintiff's said husband were and are alienated, her domestic peace and happiness were destroyed, and plaintiff has been deprived of her home, her means of support,' for the reason that the same are redundant, irrelevant, and immaterial."

On hearing, the motion was overruled, to which counsel for defendant excepted. The answer was then filed on behalf of defendant, in which the allegations of the petition in regard to the marriage of plaintiff with Oscar G. Case and the existence of the marriage relation at the beginning of the suit, and that before such marriage the plaintiff was an unmarried woman, were admitted and each and every other allegation of the petition was denied. There was a trial of the issues to the court and a jury, resulting in a verdict for plaintiff in the sum of \$4,750, and on hearing of defendant's motion for a new trial the plaintiff was required to remit from the amount of the verdict the sum of \$2,250, or a new trial was awarded the defendant. The plaintiff made a remittitur of the amount required and the motion for new trial was overruled and judgment rendered in favor of plaintiff for \$2,500, and on behalf of defendant the case is presented to this court for review.

The first assignment of error to which our attention is

directed by counsel in their argument is that the trial court erred in overruling the motion of defendant to strike out of each count of the petition what was claimed to be immaterial, redundant, and irrelevant matter, being all that portion of each count in which the alienation of the affections of plaintiff's husband, the destruction of her domestic peace and happiness, and deprivation of her home and means of support were stated as elements of damages resulting from the alleged slanderous words spoken of plaintiff by defendant. We think that the framer of the petition meant by the portions of the petition attacked by the motion to state, and, by a fair construction of the words employed, did state, that the plaintiff was deprived of the conjugal society of the husband; that he did not live with her or support her, or that they were separated as a result of the alleged slanderous reports. The counsel for defendant insist that this was not a reasonable and probable consequence of the utterance of the slanderous words charged, and is not and cannot be considered as an element of damages. With this contention we cannot agree. It is true that the separation may be and is the act of the party who in belief of the reports feels wronged, but the moving cause for such act, and without which it would not occur, is the effect of the slander upon the mind directly inducing such action. The wrongful act of the slanderer is the cause of the wrongful act of the husband or wife injured, and it is not only natural, but reasonable that a husband or wife, upon knowledge of such reports as were the basis of this suit, and a belief of them, should and does deny to the one to whom they attach or apply conjugal rights and duties, and we can discover no true reason for denying the party, in this case the wife, a remedy against the one who caused the injury, the slanderer. Such was the conclusion reached by Lord Campbell in the case of *Lynch v. Knight*, 9 H. L. [Eng.], 577. (See, also, Cooley, Torts, note to pages 227, 228; *Hodgkinson v. Hodgkinson*, 43 Neb., 269.) Of the

cases cited by counsel for defendant to sustain their view of the question involved is that of *Georgia v. Kepford*, 45 Ia., 48, an action of slander in which it was alleged that the defendant falsely charged plaintiff, who was a married man, with the crimes of adultery and larceny, and in consequence thereof the plaintiff's wife abandoned him and refused to live with him. The court held: "Desertion of the husband by the wife in consequence of the publication of a charge against him of larceny and adultery is not such a natural and proximate consequence of a slander as to entitle him to special damages therefor;" but also stated: "*Semble*, that if the charge had been made for the purpose of inducing the desertion, special damages would have been recoverable therefor." A comparison of the reasoning employed in the Iowa case with that in the case of *Lynch v. Knight*, *supra*, convinces us of the superiority of the arguments used in the latter, and the soundness of the conclusion therein reached. We will, therefore, adopt and follow them; and where proof is made of the publication of the slanderous reports, and it is also proved that the desertion of the husband or wife resulted as a consequence thereof, the injured party is entitled to compensation or damages for such desertion.

Another assignment of error is that the court erred in refusing to give to the jury instruction numbered 3 requested by defendant. The instruction referred to reads as follows: "The jury are instructed that in this case they cannot assume or infer any damages except such as are the direct and immediate result of the slanderous words spoken and published. The loss of the plaintiff's home, the alienation of the affections of her husband, domestic peace and happiness, and bodily health are not such direct and immediate results; but before any damages can be allowed for such loss it must be established by a preponderance of the evidence, and must be proved to have been occasioned by the speaking and publishing of the slanderous words charged

and offered in this cause." To arrive at a just conclusion in regard to this alleged error it will be necessary to notice a portion at least of what the trial court did, or rather failed to do, when instructing the jury in reference to the claim of the plaintiff for damages, in so far as the elements of injury alluded to in the instruction quoted were involved, or should have been noticed. In charging the jury the court first gave a summarized statement of each of the three causes of action and in each made no reference to the elements of damages claimed by the plaintiff as alleged in full in each cause of action in the petition, but closed it by saying: "by reason of which the plaintiff claimed damages in the sum of \$3,000," and in one \$4,000, and then further said: "The jury are instructed that the material allegations of the petition are the following," and after first, second, etc., relating, in regular order, to the publication of the slanders of the plaintiff, their falsity, etc., in the fifth gave as one of the material allegations, "that by reason thereof the plaintiff has been damaged in her reputation," here again entirely omitting the plaintiff's claim of damages for loss of society of the husband and loss of home, etc., and in no portion of the charge is any reference made to these elements of the plaintiff's claim for damages, except in the instruction numbered 18 this general one appears: "If from the evidence in the case and under the instructions of the court the jury find the issues for the plaintiff and that the plaintiff has sustained damages as charged in the petition," followed by directions as to the manner of estimating damages. Here the jury were plainly informed that they might consider and find upon the question of damages, under all the allegations of the petition in that respect, and no other, further, or different mention or reference was made to or of the elements of damages to which it was sought to direct their attention by the instruction numbered 3 requested on behalf of defendant. The evidence discloses that the plaintiff and her husband had

"difficulties," and during cross-examination she was asked the question: "You have left him?" meaning her husband, and she answered, "Yes, sir," and there is a lack of any direct evidence to show that it was by reason of the alleged slanderous reports that the separation of plaintiff and her husband ensued. We are convinced from a consideration of all the evidence introduced bearing upon this branch of the case, coupled with its being almost entirely ignored in the instructions as given, that it was error to refuse the one tendered by the defendant. To fairly submit the case to the jury an instruction in regard to this particular portion of it was necessary, and none being prepared and given by the court on its own motion and one offered by the defendant, the party to whose prejudice the failure to so instruct would operate, it was error to refuse to give it, and which we cannot say was without prejudice to the substantial rights of defendant.

The court, on consideration and determination of the motion for new trial, evidently concluded that the verdict was excessive and ordered a remittitur of the sum of \$—— therefrom, which was made by the plaintiff. It is claimed by defendant that it was an error on the part of the court to so rule; that it should have set the verdict aside and ordered a new trial upon becoming convinced that the verdict was too large. It is also urged that the verdict should have been set aside on the grounds of misconduct of counsel for plaintiff during the closing argument to the jury, consisting of statements then made by the attorney. A discussion of these two alleged errors is not necessary to a decision of the case, and as there must be a new trial granted because of the error hereinbefore indicated, and these, if errors, will probably not occur again if a new trial takes place, we will not further notice them.

Objections were made to certain of the instructions given by the court on its own motion and are now urged in this court. An examination of the instructions which it is

claimed are erroneous leads us to the conclusion that some of them are somewhat imperfect in their statements of the matters sought to be presented to the jury and of the rules for their guidance, and some are not very skillfully drawn, but we do not think they are open to the objections urged against them, and as a new trial must be awarded we will leave to the trial court, in the event of such new trial, the task of revising and correcting any of the instructions now in the case which it may desire to use.

The counsel for defendant, in noticing alleged errors in the admission of testimony, make the following statement: "We contend that the court erred in admitting the evidence in response to questions numbered 30, 31, 33, 38, 41, 50, 51, 60, 68, and 70 respectively, and especially the questions which asked for general conversations, and the conduct of Oscar G. Case, the husband of defendant in error, and the arrangements made with a view of keeping watch over the conduct of the defendant in error," and proceeds with an argument directed generally against all the testimony elicited in answer to the questions enumerated, and not any particular portion of it. This evidence was, in the main, in relation to conversations between the witness and defendant, portions of which were about matters directly in issue, and at least one of which occurred in the presence and hearing of plaintiff's husband. To the extent that the testimony disclosed that an arrangement was made by which the witness and others were to watch the conduct of plaintiff, it was competent, for it was further disclosed that it was made by and with the consent and probably at the solicitation of the husband and son, although the mother, judging from what appears on this point in the testimony, was the most active and effective worker in perfecting such arrangements. This evidence clearly tended to show the condition of the husband's feeling toward his wife and was material and competent.

On the subject of evidence and errors claimed to have

been committed by the trial court in ruling upon its admissibility, the counsel for defendant further state in the brief: "The evidence elicited to questions 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 330, 332, 333, 334, 335, 336, 337, 339, 340, 342, 343, and 381 should have been excluded by the court," and this is followed by a general argument as to admissibility of evidence given in answers to interrogatories numbered in the record as indicated in the statement quoted and without reference to any particular portion or portions of it. A large part of this testimony, considered as a whole, as counsel for defendant elected to argue and present it for examination, related to the life of plaintiff and husband from the date of marriage to the time of their trouble and separation, and without doubt some of it was incompetent and immaterial and some proper and relevant, but, as we view it, none of this portion prejudicial to the rights of defendant. Other portions of this testimony which referred to conduct and acts of the husband prior to the dates of the alleged slanders tended to show an estrangement of his affections from the wife and transfers of his property which were made prior to such dates, and all of which might have been considered, and probably were, by the jury in estimating the damages to be awarded plaintiff, were not proper and should have been excluded and their admission was error.

Counsel for defendant also argue an objection to question numbered 150 in the record and the answer thereto. The portion of this answer by which it appeared that the witness then giving testimony went to the place therein indicated, at the solicitation of plaintiff's husband to watch her, was competent as tending to disclose the state of the husband's feelings toward the wife. The judgment of the lower court is reversed and the cause remanded.

REVERSED AND REMANDED.

ANNIS L. HILL, APPELLANT, V. CHARLES O. PIERSON,
APPELLEE.

FILED JUNE 19, 1895. No. 6329.

1. **Gambling Places: PUBLIC NUISANCES.** A place kept for gambling purposes is a public nuisance.
2. **Public Nuisances: RIGHT OF PRIVATE PERSON TO INJUNCTION.** A public nuisance, criminal in its nature, will be enjoined at the instance of a private party only upon a showing of some special injury suffered by him aside from that suffered in common with the remainder of the public.
3. ———: ———: **JUDGMENT FOR DEFENDANT.** The evidence examined, and *held* to sustain the conclusions of the trial court.

APPEAL from the district court of Douglas county.
Heard below before FERGUSON, J.

J. W. West, for appellant.

John L. Webster, *contra*.

HARRISON, J.

June 9, 1893, the plaintiff commenced an action in the district court of Douglas county, in which the petition filed, or the portion we need notice, read as follows:

"The plaintiff for cause of action states:

"1. That on or about the 17th day of December, A. D. 1892, one Frank A. Kemp was the absolute owner in fee-simple of the following described property in Douglas county, Nebraska, to-wit: The west twenty-two feet of the east one-half of lot 4, in block 120, in the original city of Omaha, county and state aforesaid, said property being known as No. 1321 Douglas street, in said city; and there-upon, to-wit, on the date aforesaid, said Kemp entered into a lease in writing for the premises aforesaid with the defendant Charles O. Pierson, which leasing was for the term

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commencing on the 1st day of January, A. D. 1893, and ending on the 31st day of December, A. D. 1896, a copy of which lease is hereunto attached, marked 'Exhibit A,' and made a part of this petition.

"2. That thereupon the said defendant Charles O. Pierson entered in and upon the said premises as the tenant of him, the said Frank A. Kemp.

"3. That thereafter, to-wit, on or about the — day of —, A. D. 18—, the said Frank A. Kemp, for a valuable consideration, did grant, bargain, sell, and convey the premises aforesaid to this plaintiff by a good and sufficient warranty deed, through and by which this plaintiff became the absolute owner in fee-simple of the premises aforesaid, taking the said real estate free and clear of all incumbrances save only the lease aforesaid, and thereupon the said Charles O. Pierson did accept, and has accepted, this plaintiff as landlord of the premises aforesaid and has paid rent for the use and occupation of the said premises to this plaintiff.

"4. The plaintiff further alleges that the said defendant is maintaining a nuisance in and upon the said premises, which nuisance consists in this, to-wit, that the said defendant is using the said premises as a gambling place, and is keeping and maintaining thereon and therein gambling tables, and is maintaining thereon and therein a faro bank, and is maintaining and carrying on thereon and therein games of chance, known as keno, roulette, hazard, and various other and sundry games of chance, the technical names of which are to this plaintiff unknown.

"5. The plaintiff further alleges that the keeping and maintaining upon and in the premises aforesaid of the nuisance as aforesaid has brought the premises aforesaid into ill-repute, and if permitted to be maintained and carried on in and upon the said premises, the plaintiff will become subject to statutory liabilities, which will bring upon her great and irreparable injuries, and will subject her to public scandal and disgrace.

"6. The plaintiff further alleges that the keeping and maintaining of the nuisance aforesaid in and upon the said premises is a great and irreparable injury to the plaintiff's said property, from the nature and character of which injury redress at law would be uncertain and inadequate, and the damages resulting therefrom impossible of ascertainment. * * *

"7. The plaintiff further alleges that the defendant, for the purpose of more effectually carrying on and maintaining said nuisance in and upon said premises, is about to alter and rebuild the interior part of said building by changing the partitions and stairways therein contained so that the said building shall be cut up into divers and sundry secret passages, stairways, and rooms, and is about to cut and alter the water pipes, sewer pipes, and gas pipes and connections thereof in and upon the said building, to the great and irreparable injury of the plaintiff and her said property, and from the nature and character of said property and building, such alterations, additions, and changes of said building would cause great and irreparable injury to the plaintiff's said property.

"Wherefore the plaintiff prays that the said defendant and his agents and employes, and each of them, be restrained by order of this court from maintaining, or permitting to be maintained, or from carrying on, or permitting to be carried on, in, or upon, or about the said premises any games of chance, gambling tables, faro banks, roulette wheels, or games of poker or hazard, and each and every other game of, or under, any name whatsoever, and be restrained from altering, changing, rebuilding, or removing any of the partitions, walls, floors, stairways, passage-ways, doors, or windows in, upon, or about said building, and from changing, cutting, removing, or altering any of the water pipes, sewer pipes, or gas pipes, or the connections thereof, in, upon, or about the said premises; and for such other and further relief as in equity and good conscience she may be entitled to have."

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The lease, "Exhibit A," was conditioned for the payment of rent by the tenant of \$2,500 per year, to be paid monthly in advance, the tenant also to pay water rent and taxes, and contained the following statement in relation to alterations and repairs: "The said party of the second part is to have the right to make such necessary alterations and repairs in and about the said premises as may be necessary for the conducting of his business, and to rebuild and alter the stairways in and about the said building, and to alter, change, and rebuild the front of the said building; such alterations and repairs of said building to be made under the direction of the superintendent of buildings of Omaha; and the said party of the second part hereby agrees, if the party of the first part so elects at the termination of this lease, to restore the front of said building and leave it in the condition it now is; all such repairs and alterations to be paid for by the party of the second part, and to be made without expense to the party of the first part."

The premises were leased to and occupied by defendant for saloon purposes. On the day the action was instituted a restraining order was made and issued, and the hearing of the application for an injunction was fixed for the 17th day of June, 1893, on which date plaintiff was granted time to prepare and file affidavits in support of her application for injunction, and the hearing was continued to June 19, 1893. The following journal entry shows what was done on June 19th: "Now, on this 19th day of June, A. D. 1893, this cause came on to be heard upon the petition and the evidence for final disposition, and the court, being fully advised in the premises, and having heard the arguments of counsel for both plaintiff and defendant, finds that the plaintiff is not suffering any pecuniary injury from the nuisance complained of, and that there is no equity in plaintiff's bill. It is therefore ordered, adjudged, and decreed, and considered by the court that plaintiff's application for an injunction be refused, and the temporary

restraining order be and hereby is discharged, and plaintiff's bill be dismissed at her costs; to which findings, judgment, and order of the court the plaintiff at the time excepts, and is given forty days from the rising of the court to prepare and serve her bill of exceptions."

The evidence discloses that the rooms on the second or upper floor of the building occupied were used for gambling and open to the public and resorted to for such purpose. One of the questions argued and presented for determination is, whether a house kept for gambling is a common or public nuisance. This must, in view of the authorities bearing upon it, be answered in the affirmative. (See Roscoe, Criminal Evidence, 821; Garrett, Nuisances, 227; *Rex v. Rozier*, 1 B. & C. [Eng.], 272; Wood, Nuisances, 63; *Rex v. Dixon*, 10 Mod. [Eng.], 336; 8 Am. & Eng. Ency. of Law, 1073.)

Another point discussed and presented for adjudication is, will the continuance of a public nuisance, and one which is criminal in its nature, be enjoined in an action for such purpose by a private party? It has been stated by this court that a public nuisance will be enjoined in a suit instituted by a private party for such purpose, but only when the plaintiff does or will sustain a special damage, a personal injury distinct from that which he suffers in common with the rest of the public (*Shed v. Hawthorne*, 3 Neb., 179), and in the case of *Farrell v. Cook*, 16 Neb., 483, this rule was applied where the nuisance enjoined was both public and criminal in its nature, and was again recognized in the case of *Barton v. Union Cattle Co.*, 28 Neb., 350. The only thing remaining for us to determine in this case is whether the plaintiff established such special damage, such a distinct personal injury as to warrant the granting of an injunction against the continuance of gambling upon her premises. The case of *Farrell v. Cook*, *supra*, was one in which the nuisance enjoined was near the plaintiff's residence and materially disturbed the complainant in the

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enjoyment of his home. In the case at bar it is conceded that the plaintiff was not a resident of Omaha or of this state, hence there was no special injury to plaintiff's habitation or home or enjoyment thereof, such as was the basis of the action of the court in granting the injunction in the case cited. We have carefully examined all the evidence in this case, and from such examination are satisfied that, although conflicting as to some particulars, it sustains the conclusion of the trial judge, from which he announced that the plaintiff had not made a sufficient showing to entitle her to the relief asked. The judgment of the district court must be

AFFIRMED.

I. R. ALTER ET AL. V. L. L. COVEY ET AL.

FILED JUNE 19, 1895. No. 6140.

Trial: RULINGS ON EVIDENCE: REVIEW. Error cannot be predicated upon the refusal of the district court to permit a witness to answer a certain question, when there was made no offer of proofs which would be elicited if the desired answer was permitted to be made.

ERROR from the district court of Howard county. Tried below before HARRISON, J.

T. T. Bell, for plaintiffs in error.

Paul & Templin and *W. H. Thompson*, contra.

RYAN, C.

In the district court of Howard county plaintiff replevied from the defendant 171 steers, being such surviving part of 200 as had been entrusted to the defendant for keeping through the winter of 1890 and 1891. The

plaintiff also claimed damages to the amount of \$300 on account of the negligent manner in which said 171 steers had been kept, as well as the market value of the other twenty-nine head, which had died or been lost, estimated at \$810. The defendant claimed the right to the possession of the cattle replevied by virtue of his right to an agister's lien by reason of the performance of his own undertakings, evidenced by a written contract, by virtue of which he undertook and did care for and "rough through the winter of 1890 and 1891, 200 head of Utah cattle, at \$5 per head." It was stipulated in this agreement that if aforesaid cattle were lost, or should die through the neglect or fault of the defendants, that they should pay the market value of all cattle which "are so lost or die." It was conceded that in some inexplicable manner two steers were lost, but the contention of the defendants was that the other twenty-seven head died without their fault or neglect. There was a verdict and judgment for the defendants in the sum of \$870.32.

In argument plaintiffs urge as one ground of reversal that they should have been permitted to show what meaning was attached to the expression "roughing through the winter." It is a sufficient answer to this to say that there was no offer made whereby was shown what the witness, if permitted, would testify was such meaning. The alleged error, if such it was, is not available, as has been held in many cases by this court. It is urged that the verdict was for too large an amount, but we can only say as to this that it was within the limits of the proofs, and therefore we cannot now say it was excessive. These are the only questions discussed in the brief of plaintiffs in error. The judgment of the district court is

AFFIRMED.

HARRISON, J., having presided at the trial in the district court, took no part in the decision of this case.

MICHAEL O'DONOHUE, APPELLEE, V. MILTON D. POLK
ET AL., APPELLANTS.

FILED JUNE 19, 1895. No. 5947.

1. **Pleading: WAIVER OF MATERIAL ALLEGATION.** The want of a material allegation in a petition may be waived by a failure to challenge attention to it in the district court.
2. **Conflicting Evidence: REVIEW.** Findings of fact upon conflicting evidence will not be disturbed on appeal unless manifestly unsustained by the evidence.

APPEAL from the district court of Cass county. Heard below before CHAPMAN, J.

C. S. Polk and Mockett, Rainbolt & Polk, for appellants.

Matthew Gering, contra.

RYAN, C.

The appellee alleged in the district court of Cass county that he had obtained on August 24, 1891, a judgment in the county court of said county against Milton D. Polk for the sum of \$499.25 and costs; that a transcript of said judgment had been duly filed in the office of the clerk of the aforesaid district court; that an execution issued upon said judgment had been returned "No property found whereon to levy;" that on the 30th of August, 1889, said Milton D. Polk had conveyed to his father, John F. Polk, certain described real property in Cass county, which plaintiff sought to subject to the payment of his judgment; that said conveyance was fraudulent as against the creditors of Milton D. Polk and was without consideration; that said Milton D. Polk was insolvent and had no property whatever out of which the aforesaid judgment could be satisfied; that to further promote the fraudulent purpose aforesaid

the said John F. Polk had conveyed said real property to his brother-in-law, S. O. Leeson, who was the uncle of Milton D. Polk, and that each of said conveyances was, with full knowledge of each party to it, of the fraudulent purpose which actuated every other party. The parties to the above transfer were made defendants and upon issues joined there was a trial, which resulted in a decree subjecting the above mentioned real property as prayed.

It is first insisted that there was alleged no levy upon the real property in aid of which the equitable powers of the district court have been invoked. If this objection had been made before trial it would have been entitled to serious consideration, for it points to a very serious defect in the petition. No question or objection was made to the sufficiency of the averment in any respect until this hearing on appeal, and it is now too late to urge it effectually. To the argument that there was no averment that the conveyances attacked prevented the subjection of the aforesaid real property to the payment of the plaintiff's judgment, it is deemed sufficient to answer that while the general conclusion was not stated, there were recited such facts as fully justified the assumption that such hindrance had an actual existence. While the evidence was such that a finding thereon in favor of the defendant would not have been disturbed as without sufficient support, it, on the other hand, was not so deficient in amount or weight as to justify an interference with the decree which was actually entered. The judgment of the district court is

AFFIRMED.

WALTER L. SELBY ET AL. V. P. J. MCQUILLAN ET AL.

FILED JUNE 19, 1895. No. 5672.

Judgment Against Sureties on Appeal Bond: NOTICE.

Upon the rendition of a judgment against appellant in the district court, that court has no such jurisdiction of the person of the surety in the appeal undertaking that it may render the same judgment against him that it may against the appellant. *Moore v. Kepner*, 7 Neb., 291, and *Lininger v. Raymond*, 9 Neb., 40, distinguished, and *Banghart v. Lamb*, 34 Neb., 535, overruled.

ERROR from the district court of Douglas county. Tried below before KEYSOR, J.

Hall & McCulloch and *Brown & Talbott*, for plaintiffs in error.

John P. Breen, contra.

RYAN, C.

Plaintiff in error Walter L. Selby was surety on an appeal bond, by virtue of which this cause was brought to the district court of Douglas county. The action was replevin, in which John J. Wilkinson was plaintiff and P. J. and Bridget McQuillan were defendants. Upon a verdict in the district court aforesaid there was a judgment in favor of the McQuillans for \$520.82, the value of the property replevied. Immediately following the recitation of these facts in the record there was this language: "The court finds that Walter L. Selby is surety upon the appeal bond herein and that he is liable as such surety on said appeal bond in the sum of \$520.82 and the costs." For the sum last named there was thereupon rendered a personal judgment against both Wilkinson and Selby.

By the petition in error the sole question to be determined is whether or not the district court had jurisdiction

of the person of the defendant by virtue of the mere fact that he had executed an appeal undertaking with Wilkinson, the appellant. In *Moore v. Kepner*, 7 Neb., 291, MAXWELL, J., delivering the opinion of this court, said: "Objection is made that judgment was rendered against Eatherly as surety, without notice. As a rule, sureties upon bonds and contracts are entitled to notice of the pendency of an action upon such obligations, and they will not be concluded by the judgment unless they have had an opportunity to defend. But this rule has no application where the surety has contracted with reference to one of the parties to an action in court in the nature of the one at bar. In such case, by becoming surety, he submits to the jurisdiction of the court and is concluded by judgment." It is not at all clear from this language why the surety was held liable. Shortly afterward the writer of the above quoted language, in *Lininger v. Raymond*, 9 Neb., 40, more clearly expressed his meaning, for he said: "In *Moore v. Kepner*, 7 Neb., 291, it was held that judgment might be rendered against a surety on an appeal bond in replevin, the case having been appealed from the county court of York county to the district court, where judgment was rendered against the appellant and his surety. This was proper. (General Statutes, 257.) But it does not apply to an ordinary replevin bond." The principle upon which this proposition in the case of *Moore v. Kepner*, *supra*, was decided was that a party, by signing an appeal bond, submitted himself to the jurisdiction of the district court, for such effect resulted from the statute. Turning to page 257, General Statutes, above referred to, we find the section concerning appeals, which is in this language: "Sec. 37. When judgment is affirmed, the district court shall, on motion, render judgment against the appellant and his sureties for the amount of the judgment below, damages, and costs, in case such damages can be ascertained by the court without a trial." The above section had been

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repealed long before the filing of the opinion or the taking of the appeal in *Banghart v. Lamb*, 34 Neb., 535, but without this fact being noted this court declared the law in relation to the rendition of judgment against an appeal surety to be the same as had been recognized in *Moore v. Kepner*, *supra*, and *Lininger v. Raymond*, *supra*. When the oversight above noted was discovered, this court, upon its own motion, ordered a rehearing. The cause was settled and dismissed, so that no opportunity earlier than the present has ever been presented to correct this mistake. The statute which should have been applied in *Banghart v. Lamb*, *supra*, was the same as must be applied in the case at bar, and this is its language: "When an appeal shall be dismissed, or when judgment shall be entered in the district court against the appellant, the surety in the undertaking shall be liable to the appellee for the whole amount of the debt, costs, and damages recovered against the appellant." (Code, Civil Procedure, sec. 1014.) This section makes no reference to the rendition of judgment against an appeal surety, neither does it purport to make him a party to the appeal which by the undertaking which he has signed he has caused to be accomplished. The statute, as it now stands, simply declares that the judgment and costs shall be the amount for which the appeal surety is liable. It provides no special remedy for the enforcement of that liability. Because of the repeal of the section of the statute upon which was based the conclusion announced in *Moore v. Kepner* and in *Lininger v. Raymond*, those cases are no longer an authority for the rendition of a judgment against an appeal surety in an action wherein the appeal undertaking is filed. The case of *Banghart v. Lamb*, *supra*, having been decided under the mistaken belief that the statute was as it stood when the above two cases were decided, must be and is overruled. The judgment of the district court against Walter L. Selby was without warrant of law and is therefore

REVERSED.

AUGUST CARSTENS, APPELLEE, v. JAMES W. ELLER
ET AL., APPELLANTS.

FILED JUNE 19, 1895. No. 5925.

Conflicting Evidence: REVIEW. In this appeal is involved only a question of fact determined upon conflicting evidence by the district court. In such case the judgment will not be reversed.

APPEAL from the district court of Douglas county.
Heard below before IRVINE, J.

A. S. Churchill and J. W. Eller, for appellants,

Connell & Ives, contra.

RYAN, C.

The appellee began this action in the district court of Douglas county for the foreclosure of a purchase money real estate mortgage. The appellants, J. W. Eller and Frances E. Eller, his wife, James W. Logan and his wife, who made the aforesaid mortgage, defended upon the ground that the debt secured had been fully paid. The rights of Mary A. Putney and her husband are based on a subsequent mortgage to that on which foreclosure proceedings were begun, hence they need not be described more at length.

There is but one question material to the determination of this appeal, and that is whether a deed, in consideration of \$7,500 made by J. W. Eller and his wife, was delivered to and accepted by the appellee. If this fact existed, the mortgage upon which foreclosure proceedings were begun was fully paid and appellee was not entitled to maintain his action for the relief indicated. It is quite probable that the appellee and his wife agreed to accept the conveyance of the real property above referred to in full discharge of

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the balance due upon appellee's mortgage on a part of the property mortgaged. He, however, refused to accept of any payment or receive the deed tendered him until he had consulted his attorney with reference to the title which the proposed deed, when delivered and accepted, would vest in him. Appellee, with Mr. and Mrs. Eller, thereupon together went to said attorney's office and there Mr. Eller submitted the proposed conveyance and other papers for approval. The attorney for appellee, upon various pretexts, avoided passing upon the question submitted for his judgment and succeeded in deferring action until some indefinite day in the future. It is unnecessary to inquire how it happened. It is sufficient to state that after the meeting in the attorney's office appellee refused further to proceed with his trade. There were various efforts upon the part of Mr. Eller to commit appellee to the terms doubtless previously assented to by Carstens, but without success, for the appellee insisted that he had not in law bound himself and did not propose so to do. When foreclosure proceedings were begun Mr. Eller, his wife, and their associates asserted that the deed, when submitted to Mr. Ives, the attorney of appellee, passed the title to said appellee for the reason alleged, that it was tendered and received as a conveyance. Upon this question, which was one of fact, it cannot be claimed that there was less than a conflict of evidence. The district court found adversely to the appellants. This finding was amply sustained by the proofs, and the judgment appealed from is therefore

AFFIRMED.

IRVINE, C., not sitting.

W. B. RICE, APPELLEE, V. WILLIAM WINTERS ET AL.,
APPELLANTS.

FILED JUNE 19, 1895. No. 6435.

1. **Bill of Exceptions: AUTHORITY OF CLERK TO SIGN.** The mere stipulation of counsel in a case that the clerk of a court may sign and allow a bill of exceptions is not sufficient to confer authority upon him to do so. To confer authority upon the clerk of a district court to sign and allow a bill of exceptions it must appear that the judge is dead, or that he is prevented by sickness, or absence from his district, from signing and allowing the bill; or the parties to the litigation, or their counsel, must agree upon the bill of exceptions, and attach thereto their written stipulation to that effect. *Scott v. Spencer*, 42 Neb., 632, followed.
2. **Mortgages: PAYMENT: SUBROGATION.** A owned real estate on which B had a first and C a second mortgage. D loaned A money to pay off B's mortgage. A agreed to and did secure D's loan by an apparent first mortgage on the real estate. The loan made by D was used in paying off the mortgage of B, and he released the same. When the mortgage of A to D was delivered, the mortgage records showed a marginal release of C's mortgage signed "C, by J." It turned out that C's mortgage had never been paid, and was released by J without authority. *Held*, That D was not entitled to be subrogated to the lien held by B by virtue of his mortgage against the real estate.
3. **Subrogation.** The doctrine of subrogation is not administered by courts of equity as a legal right, but the principle is applied to subserve the ends of justice and to do equity in the particular case under consideration. It does not rest on contract, and no general rule can be laid down which will afford a test in all cases for its application. Whether the doctrine is applicable to any particular case depends upon the peculiar facts and circumstances of such case. *South Omaha Nat. Bank v. Wright*, 45 Neb., 23, followed.
4. —: **VOLUNTARY PAYMENT.** A person seeking the benefit of subrogation must have paid a debt due to a third party before he can be substituted to that party's right; and in doing this he must not act as a mere volunteer, but on compulsion to save himself from loss by reason of a superior lien or claim on the

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part of the person to whom he pays the debt. The right of subrogation is never accorded in equity to one who is a mere volunteer in paying a debt of one person to another. *Ætna Life Ins. Co. v. Middleport*, 124 U. S., 534, followed.

5. ———: MORTGAGES: PRIORITY. The fact that a subsequent mortgagee's lien will occupy the same relation to the property, if one who has advanced money, secured by a mortgage on the real estate to pay off the prior mortgage, is subrogated to the rights of the holder of such first mortgage, affords no reason why equity should permit the party so advancing the money to be subrogated to the rights of the holder of the first mortgage.
6. **Mortgages: LIENS.** When a first mortgage lien existing against real estate is paid off, the lien of a second mortgage thereon becomes at once by operation of law a first lien on the property, and this first lien and the right to enforce it as such are vested rights.
7. **Subrogation.** Courts of equity will not apply the doctrine of subrogation where to do so would be to deprive a party of a legal right.
8. **Mortgages: ABSTRACTS OF TITLE.** An intending purchaser or mortgagee of real estate relies and acts upon the recitals of an abstract made of the title to such real estate at his peril.
9. ———: ———: RECORDS: NOTICE. An abstract of title of certain real estate recited that a mortgage recorded thereon in favor of C had been released on the margin of the record where recorded. *Held*, (1) That an intending mortgagee of the property was bound to take notice of the mortgage records, and if C's mortgage had not in fact been released and the mortgagee was prejudiced by relying upon the recital of the abstract, that his injury was the result of his negligence; (2) that if C's mortgage appeared released, on the margin of the record where recorded, by some one else purporting to act for him, the intending mortgagee was bound to know at his peril that the party pretending to act for C had authority to do so; (3) that whether the mistake of the mortgagee was one of law or fact, or both, whatever injury he sustained by reason of such mistake, was attributable to his lack of care, and afforded no reason for subrogating him to the rights of the holder of a mortgage on the premises prior to C's, which the said mortgagee had paid off with the proceeds of a mortgage he took on said property, relying upon the correctness of said abstract.

APPEAL from the district court of Buffalo county.
Heard below before NEVILLE, J.

The facts are stated by the commissioner.

Calkins & Pratt, for appellants:

The appellants contend that the appellee, not being a surety or guarantor of the defendant Winters, nor having any junior lien upon the premises of any kind to protect, and not being under any obligation, moral or legal, to pay the notes and mortgages executed by Winters to Moore, was a stranger. (*Suppiger v. Garrels*, 20 Ill. App., 625; *Ætna Life Ins. Co. v. Town of Middleport*, 124 U. S., 549.)

When appellee loaned Winters the money with which to liquidate, he was a volunteer. (*Ætna Life Ins. Co. v. Town of Middleport*, 124 U. S., 549; *Suppiger v. Garrels*, 20 Ill. App., 625; *Richards v. Griffith*, 28 Pac. Rep. [Cal.], 485.)

There being no agreement or understanding between Winters and the appellee that the Moore mortgages were to be assigned to the appellee or that they were to be kept alive and on foot for his use and benefit, he is not entitled, as a matter of course, in equity to be subrogated. (*National Bank v. Cushing*, 53 Vt., 326; *Dering v. Earl of Winchelsea*, 1 L. Cas. Eq. [6th ed., Eng.], 14; *Watson v. Wilcox*, 39 Wis., 643; *Downer v. Wilson*, 33 Vt., 1; *Guy v. Du Uprey*, 16 Cal., 196; *Sandford v. McLean*, 3 Paige Ch. [N. Y.], 122; *Wormer v. Waterloo Agricultural Works*, 14 N. W. Rep. [Ia.], 332; *Fort Dodge Building & Loan Association v. Scott*, 53 N. W. Rep. [Ia.], 282; *Bunn v. Lindsay*, 7 S. W. Rep. [Mo.], 473; *Grady v. O'Reilly*, 22 S. W. Rep. [Mo.], 798; *Kleiman v. Geiselman*, 21 S. W. Rep. [Mo.], 796; *Kitchell v. Mudgett*, 37 Mich., 81; *Shinn v. Budd*, 14 N. J. Eq., 237; *Curtis v. Kitcher*, 8 Mart. [La.], 706; *Hough v. Ætna Life Ins. Co.*, 57 Ill., 318; *Small v. Stagg*, 95 Ill., 39; *Wentworth v. Tubbs*, 55 N. W. Rep. [Minn.], 543; *Appeal of McCleary*, 12 Atl. Rep. [Pa.], 160; Sheldon, Subrogation, secs. 2, 3, 240; *Cox v. Baldwin*, 1 Miller [La.], 147.)

Winston & Meagher, also for appellants :

The demand of a creditor which is paid with the money of a third person, without any agreement that the security shall be assigned or kept on foot for the benefit of such third person, is absolutely extinguished. (*Pearce v. Bryant Coal Co.*, 121 Ill., 590; *Swan v. Patterson*, 7 Md., 164; *Bank of United States v. Winston*, 2 Brock. [U. S.], 254; *Burr v. Smith*, 21 Barb. [N. Y.], 262; 1 Jones, Mortgages, 877; *Collins v. Adams*, 53 Vt., 433; *Gadsden v. Brown*, 1 Speer's Eq. [S. Car.], 37; *Bishop v. O'Conner*, 69 Ill., 431; *Sandford v. McLane*, 3 Paige Ch. [N. Y.], 117; *Banta v. Garmo*, 1 Sandf. Ch. [N. Y.], 384; *Wilkes v. Harper*, 1 Comst. [N. Y.], 586; *Douglass v. Fagg*, 8 Leigh [Va.], 588; *Young v. Morgan*, 89 Ill., 199; 2 May, Insurance, sec. 558; *Erb's Appeal*, 2 P. & W. [Pa.], 296; *Goswiler's Estate*, 3 P. & W. [Pa.], 200; *McGinnis' Appeal*, 16 Pa. St., 445; *Lloyd v. Galbraith*, 32 Pa. St., 103; *Richmond v. Marston*, 15 Ind., 134; *Marvin v. Vedder*, 5 Cow. [N. Y.], 671; *Clark v. Moore*, 76 Va., 262; *Hooper v. Robinson*, 98 U. S., 539.)

Where the demand of a creditor is paid by the money of a third person, not himself a creditor, without any agreement that the security shall be assigned or kept on foot for the benefit of such third person, the demand is absolutely extinguished. (*White v. Cannon*, 125 Ill., 412; *Bayard v. McGraw*, 1 Ill. App., 134.)

A mere stranger or volunteer cannot, by paying a debt for which another is bound, be subrogated to the creditor's rights, in respect to the security, by the real debtor; but if the person who pays the debt is compelled to pay for the protection of his own interests and rights, then subrogation should be made. (*Beaver v. Slanker*, 94 Ill., 183; *Downer v. Miller*, 15 Wis., 677; *Wilkes v. Harper*, 1 N. Y., 586; *Van Winkle v. Williams*, 38 N. J. Eq., 105; Paige, Modern Equity Jurisprudence, p. 875; *Wadsworth v. Blake*, 43 Minn., 509; *Evans v. Rhea*, 14 S. W. Rep. [Ky.], 82.)

Where the creditor of a debtor, out of necessity to protect his own interest, purchases a prior lien or incumbrance he will be entitled in equity to be subrogated; but the mere volunteer or a stranger will not be. (*Beaver v. Slanker*, 94 Ill., 175.)

Where there was an agreement, the doctrine of subrogation is recognized. (*Gans v. Thieme*, 93 N. Y., 225; *Tradesmen's Building Association v. Thompson*, 32 N. J. Eq., 133; *Detroit Fire & Marine Ins. Co. v. Aspinwall*, 12 N. W. Rep. [Mich.], 214; *Sidener v. Pavay*, 77 Ind., 241; *New Jersey M. R. Co. v. Wortendyke*, 27 N. J. Eq., 660; *Shinn v. Budd*, 14 N. J. Eq., 234.)

Where there is no agreement that the party so advancing the money shall be subrogated to the prior lien-holder, there can be no subrogation in equity. (*Small v. Stagg*, 95 Ill., 39; *White v. Cannon*, 125 Ill., 412; *Banta v. Garmo*, 1 Sandf. Ch. [N. Y.], 383.)

Even where there is an agreement it has been held that a volunteer cannot be subrogated to the position of a prior claimant. (*Mather v. Jenswold*, 32 N. W. Rep. [Ia.], 512; *Wormer v. Waterloo Agricultural Works*, 62 Ia., 699; *Weidner v. Thompson*, 28 N. W. Rep. [Ia.], 422.)

The mere fact that a party is a subsequent mortgagee does not entitle him to an assignment of a prior mortgage. There must be some peculiar equity. (*Vandercook v. Cohoes Savings Institution*, 5 Hun [N. Y.], 641; *Dings v. Parshall*, 7 Hun [N. Y.], 522.)

R. A. Moore, contra, cited as to plaintiff's rights to subrogation: *McKenzie v. McKenzie*, 52 Vt., 271; *Cobb v. Dyer*, 69 Me., 494; *Levy v. Martin*, 48 Wis., 198; *Blodgett v. Hitt*, 29 Wis., 169; *Crippen v. Chappel*, 35 Kan., 495; *Harris*, Subrogation, secs. 811, 816; *Betts v. Sims*, 35 Neb., 840; *Cheesebrough v. Millard*, 1 Johns. Ch. [N. Y.], 412; *Everston v. Central Bank of Kansas*, 6 Pac. Rep. [Kan.], 611.)

Marston & Nevius, also for appellee.

RAGAN, C.

From the transcript of the record and the briefs of counsel we understand the facts in this case to be substantially these: On the 15th of June, 1887, William Winters became indebted to one R. A. Moore, and as an evidence of such indebtedness executed and delivered to Moore on said date two notes of \$700, each due respectively on the 15th days of June, 1888 and 1889, and secured said debt by a mortgage upon certain real estate. On the 30th day of April, 1888, Winters also became indebted to Grommes & Ullrich in the sum of \$3,829.76, and as an evidence of said debt gave to them a series of notes, the last two of which were for \$600 and \$429.76, respectively, and due October 31 and November 30, 1888. To secure this debt Winters executed to Grommes & Ullrich a mortgage upon the same real estate which he had previously pledged to Moore; the Grommes & Ullrich mortgage became a second lien upon the property, the incumbrance of Moore being a first lien. Winters subsequently paid all the mortgage debt owing to Grommes & Ullrich except the aforesaid last two notes of the series. In June, 1889, one John M. Lay, resided in the city of Kearney, Nebraska, and was in the habit of taking applications of persons desiring to borrow money and of referring such applications to one W. B. Rice, who, if the security proved acceptable, would make the loan applied for. About this date one E. B. Jones, an attorney at law at Kearney, seems to have had in his possession for collection the Moore mortgage, at least he was then pressing Winters for its payment. Lay, learning of this fact, took Winters' application for a loan of \$1,300, to be secured by a first mortgage on the premises already mortgaged by Winters to Moore, such loan to be used for the purpose of paying the Moore mortgage. June

1, 1889, Rice accepted Winter's application and loaned him \$1,300, taking his note therefor, secured by a mortgage on the same premises mortgaged by Winters to Moore, and with the \$1,300 the Moore mortgage was paid off and by Moore duly discharged of record on the 6th of June, 1889. About the same date said Jones released and discharged on the margin of the record where it was recorded the Grommes & Ullrich mortgage, or attempted to do so. It seems also that an abstract of the title of the real estate mortgaged was furnished to Rice before he parted with the money loaned to Winters, and that this abstract contained a notation of the abstracter that the Grommes & Ullrich mortgage had been released on the margin of the record where recorded. Rice brought this suit in equity in the district court of Buffalo county to foreclose the mortgage given him by Winters on the 1st of June, 1889, prayed for an accounting of the amount due him on said mortgage from Winters, and that he might be given a first lien upon the real estate described in said mortgage to secure the payment of the amount found due. Winters was made a party defendant to this action, but his connection with the case need not be further noticed. Grommes & Ullrich were made or became parties to the suit, and filed an answer in the nature of a cross-petition, setting out the execution and delivery to them of the mortgage, above mentioned, by Winters; that the last two notes which the mortgage was given to secure, namely, the notes for \$600 and \$429.76, with interest, remained past due and wholly unpaid; they prayed for an accounting of the amount due them from Winters, and that they be given a first lien upon said mortgaged premises for its payment. To this answer and cross-petition of Grommes & Ullrich, Rice replied: (1) That the Grommes & Ullrich mortgage had been fully paid and that there was nothing due thereon; (2) that it had been duly released and discharged of record by one E. B. Jones, acting as the agent and attorney for Grommes & Ullrich; (3) the execution of

the mortgage of the 15th of June, 1887, by Winters to Moore; that the mortgage he, Rice, sought to foreclose in this action was made for the purpose of and the proceeds used in paying off this Moore mortgage; and he prayed as in his petition he had already, and further, that he might be subrogated to the lien which Moore held against the premises by virtue of the mortgage which Winters had given him thereon, and which had been paid by the proceeds of the mortgage now sought to be foreclosed. The district court made, among others, the following special findings:

"The court further finds that one E. B. Jones, an attorney at law, undertook to release the security mortgage of Grommes & Ullrich by a release entered upon the margin of the record, but that the said Jones undertook to release said mortgage without first obtaining authority therefor, and that said Jones never was authorized by the said defendants, Grommes & Ullrich, to release said mortgage, and that said mortgage was never released, and has been at all times since the recording thereof, and now is, a valid and subsisting mortgage lien against said premises; that there is due to the said defendants Grommes & Ullrich, from the said defendant William Winters, upon their mortgage the sum of \$1,455.39, with interest thereon at the rate of eight per cent per annum from this date, and that the same is a valid and second mortgage lien against said premises.

"The court further finds that the proceeds obtained from the mortgage given by the said defendant Winters to the said plaintiff Rice were used to pay off and obtain a release and discharge of the mortgage executed by the said defendant William Winters to the said R. A. Moore.

"The court further finds that there is due to the said plaintiff Rice from the said defendant William Winters upon his said mortgage the sum of \$1,600.65, with interest thereon from this date at the rate of ten per cent per annum; and the court finds as a matter of law that the plaintiff

iff is, by reason of the facts found above, entitled to be subrogated to the lien of the mortgage so as aforesaid executed by the said William Winters to the said R. A. Moore, and that the plaintiff's lien is accordingly prior and superior to the lien of the said Grommes & Ullrich, and is a valid first mortgage lien against said premises."

To reverse this decree Grommes & Ullrich have appealed.

1. The bill of exceptions in this case was settled by the clerk of the district court of Buffalo county in pursuance of a written stipulation that he might do so, signed by the counsel for the parties to this action; but said stipulation does not recite that what purports to be is in fact the correct bill of exceptions in the case. The mere stipulation of counsel in a case that the clerk of the court may sign and allow a bill of exceptions is not sufficient to confer authority upon him to do so. To confer authority upon the clerk of a district court to sign and allow a bill of exceptions it must appear that the judge is dead, or that he is prevented by sickness, or absence from his district, from signing and allowing the bill; or the parties to the litigation, or their counsel, must agree upon the bill of exceptions and attach thereto their written stipulation to that effect. (*Scott v. Spencer*, 42 Neb., 632.) We are therefore precluded from looking into the evidence which accompanies the record of this case.

2. The sole question remaining is whether the pleadings in the case support the finding and decree of the district court. Had the finding of the district court been a general one, then it is clear that a decree based on such finding would have found ample support in the pleadings, and been conclusive upon this court; but the court has found specially that the Grommes & Ullrich mortgage was never released, that it is a valid and subsisting lien upon the premises, and as it stands of record, superior to the mortgage lien of Rice; but the learned court concluded as a matter

of law that solely because the Moore mortgage, which was a lien upon the premises superior to the mortgage of Grommes & Ullrich, was paid off and discharged with the money which the mortgage of Rice was given to secure, therefore Rice was entitled to be subrogated to the lien which Moore held against the premises by virtue of his mortgage thereon. Is this conclusion of law of the learned district court correct? The proposition may be thus stated: A owns real estate on which B has a first and C a second mortgage. D loans A money to pay off B's mortgage. A agrees to and does secure D's loan by an apparent first mortgage on the real estate. The loan made by D is used in paying off the mortgage of B, and he releases the same. When the mortgage of A to D is delivered, the mortgage records show a marginal release of C's mortgage signed "C, by J." It turns out that C's mortgage has never been paid, and was released by J without authority. Is D entitled to be subrogated to the lien B held, by virtue of his mortgage, against the real estate? There is some conflict in the authorities.

In *Emmert v. Thompson*, 52 N. W. Rep. [Minn.], 31, it was held: "Where one loans money upon real estate security for the express purpose of paying off and discharging liens or incumbrances on the same property, expecting and believing, in good faith, that his security will, of record, be substituted in fact in place of that which he discharges, he is not a volunteer, a stranger, or an intermeddler, nor is the original debt or lien or incumbrance considered extinguished, if justice requires that it should be kept alive for the benefit of the person advancing the money." The facts in this case were very much like those in the case at bar, and the court answered the question we have propounded above in the affirmative. There are other authorities of eminent respectability which by their decisions have given the same answer to the question; but we are persuaded that the decided weight of authority affords a negative answer to the question.

In *South Omaha Nat. Bank v. Wright*, 45 Neb., 23, this court said: "The doctrine of subrogation is not administered by courts of equity as a legal right, but the principle is applied to subserve the ends of justice, and to do equity in the particular case under consideration. It does not rest on contract, and no general rule can be laid down which will afford a test in all cases for its application. Whether the doctrine is applicable to any particular case depends upon the peculiar facts and circumstances of such case."

In the article entitled "Subrogation," 24 Am. & Eng. Ency. of Law, at page 281, the authorities are collated, and the result of their holding is thus stated: "One who advances money to pay the debt of another, in the absence of agreement, express or implied, for subrogation, will not be entitled to succeed to the rights and remedies of the creditor so paid, unless there is some obligation, interest, or right, legal or equitable, on the part of such person in respect of the matter concerning which the advance is made, as otherwise he is a stranger, a volunteer, an intermeddler, to whom the equitable right of subrogation is never accorded."

In *Fort Dodge Building & Loan Association v. Scott*, 53 N. W. Rep., 283, the supreme court of Iowa said: "One who loans money to satisfy several mortgages on property, and takes another mortgage on the property, without examining the records, and relying merely on an abstract not entirely up to date, which fails to notice the rendition of a recent judgment, is not entitled to subrogation under said mortgages to rights paramount to the judgment."

In *Kitchell v. Mudgett*, 37 Mich., 81, it was said: "K. paid off and discharged the first two out of three mortgages on certain property, and then took a new mortgage for the amount paid. Held that this was subsequent to the one left unpaid, and that K. was not entitled to be subrogated to the rights of the first two mortgagees."

In *Watson v. Wilcox*, 39 Wis., 643, that court held:

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"One who, having no interest to protect, voluntarily loans money to a mortgagor for the purpose of satisfying and canceling the mortgage, taking a new mortgage for his own security, cannot have the former mortgage revived and himself subrogated to the rights of the mortgagee therein." Ryan, C. J., speaking for the court, said: "Before the appellant took his own mortgage from George and Harriet Harvey, he was a stranger to the title, and had no connection with the mortgage debt due to Sarah Ann Hodson. His action in the premises was voluntary. He first proposed to purchase the Hodson mortgage, but subsequently abandoned that intention and advanced the amount due upon it for the Harveys, for the express purpose of satisfying and canceling the Hodson mortgage. This was done. The appellant thereupon took a new mortgage for his own security. It is difficult to see how the doctrine of subrogation can aid him."

In *Sandford v. McLean*, 3 Paige Ch. [N. Y.], 116, the chancellor, speaking to the point under consideration, said: "It is only in cases where the person advancing money to pay the debt of a third party stands in the situation of a surety, or is compelled to pay it to protect his own rights, that a court of equity substitutes him in the place of the creditor, as a matter of course, without any agreement to that effect."

In *Aetna Life Ins. Co. v. Middleport*, 124 U. S., 534, the supreme court of the United States, discussing the doctrine of subrogation, held: (1) That the person seeking its benefit must have paid a debt due to a third party before he can be substituted to that party's rights; and (2) that in doing this he must not act as a mere volunteer, but on compulsion, to save himself from loss by reason of a superior lien or claim on the part of the person to whom he pays the debt, as in cases of sureties, prior mortgagees, etc. The right is never accorded in equity to one who is a mere volunteer in paying a debt of one person to another.

In *Banta v. Garmo*, 1 Sandf. Ch. [N. Y.], 383, the facts are thus stated in the syllabus: "B. loaned money to G. to pay off a mortgage on the security of a new mortgage on the same lands. The old mortgage was paid off, and a discharge of the same duly executed. W. recovered a judgment against G., which was docketed after the first mortgage, and on which the lands were sold to him by the sheriff, prior to the mortgage to B. This sale was overlooked in B.'s examination of the records for liens. Held that B. was not entitled to be subrogated to the old mortgage, or to set it up in order to give him a lien prior to the judgment and sheriff's sale."

It is argued by counsel for Rice that the facts here make a proper case for the application of the doctrine of subrogation by a court of equity, for the reason that while Moore's mortgage remained unsatisfied Grommes & Ullrich's lien upon the mortgaged premises was subject thereto, and they would not be injured or prejudiced if Rice should be subrogated to the lien which Moore held, as their lien would occupy the same relation to the property after subrogation that it did prior to the satisfaction of the Moore mortgage. In *Bohn Sash & Door Co. v. Case*, 42 Neb., 281, a mortgage lien existed against an owner's real estate. He entered into a contract with B. to furnish certain labor and material and erect for him certain improvements on said real estate. B. complied with his contract and furnished labor and material to a considerable amount. After B. had furnished the labor and material the owner procured a loan from C. with which to pay off and discharge the mortgage on his real estate, agreeing to secure such loan by a first mortgage. C. made the loan to the owner and the latter executed to him a mortgage, which was duly recorded, and the prior mortgages were released and discharged of record. The owner not having paid for the labor and material furnished by B., the latter brought suit to obtain a lien against the property

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under the mechanic's lien statute. C. was made a party to the action and asked the foreclosure of his mortgage, and sought to be subrogated to the liens held by the mortgagees whose mortgages had been paid and discharged with the proceeds of C.'s loan made to the real estate owner. It was urged in that case as a reason why the doctrine of subrogation should be applied that B.'s lien for labor and materials, when the same were furnished, was subject to the then existing mortgages on the real estate, and that he would not be prejudiced by allowing C. to be subrogated to the liens of the mortgagees whose mortgages he had discharged. The district court adopted this view, but this court on appeal reversed the decree of the district court, and held that C. was not entitled, under the facts, to subrogation. The fact that a subsequent mortgagee's lien will occupy the same relation to the property, if one who has advanced money, secured by a mortgage on the real estate, to pay off the prior mortgage is subrogated to the rights of the holders of such mortgage, affords no reason why equity should permit the party so advancing the money to be subrogated to the rights of the holder of the first mortgage. When the Moore mortgage was voluntarily paid off and discharged the mortgages of Grommes & Ullrich became at once a first lien upon the mortgaged premises, and they thereby acquired the legal right to hold and enforce said lien as a first lien against the mortgaged premises. This right and lien were property, and the mere fact that the money which Rice's mortgage secures was used to pay off and discharge the Moore mortgage affords no reason, not the slightest, why a court of equity should deprive Grommes & Ullrich of the legal right which they had acquired by the voluntary act of Rice and Moore. Neither Grommes nor Ullrich said or did anything, or omitted to say or do anything, which caused Rice to make this loan and pay off the Moore mortgage, and the saying or doing, or omitting to say or do, which estops Grommes

& Ullrich from asserting the lien which they have acquired against this property by operation of law in consequence of the release of the Moore mortgage. What right has a court of equity, even under the guise and in the name of subrogation, to deprive Grommes & Ullrich of the vested rights which they have acquired against this property, simply because to do so would be a benefit to Rice? Courts of equity apply the doctrine of subrogation to subserve the ends of justice and to do equity in the particular case under consideration. Would it be doing justice in this case to deprive Grommes & Ullrich of the lien they have acquired against this property by operation of law resulting from the voluntary act of Rice and Moore and without the consent, request, knowledge, or solicitation of Grommes & Ullrich? We confess that to our minds to do this would be to do injustice, and furthermore, it would be using the powers of a court of equity to strike down a legal right, and deprive a citizen of his property. Equity follows the law, it does not thwart it. It enforces and gives effect to the legal rights of parties when the law is powerless to afford a remedy. It does not take away these legal rights.

The second argument of counsel for Rice in support of the decree is that the mortgage records were not in fact in the condition they appeared to be; that is, as we understand it, that the record in which the Grommes & Ullrich mortgage was recorded showed on its margin a release signed by one Jones, and that the abstract of title made of this property, and on which Rice acted in making this loan, recited that the Grommes & Ullrich mortgage had been released on the margin of the record where it was recorded. In other words, that Rice in making this loan acted at a disadvantage and under a mistake; but the mistake of Rice, whether of law or fact, was the result of his own negligence. He was bound to know the law, and if the record showed that the Grommes & Ullrich mortgage had been released by Jones, he was bound to know whether Jones had authority

to execute that release. If the abstract had recited that the Grommes & Ullrich mortgage had been released and it had turned out that in fact no release had ever been made or attempted to be made, then he would have acted under a mistake of fact; but if he suffered an injury from acting on such mistake, the injury would have still been the result of his own negligence. An intending purchaser or mortgagee of real estate relies and acts upon the recitals of an abstract made of the title to such real estate at his peril. In *Fort Dodge Building & Loan Association v. Scott*, *supra*, the court, speaking to this point, said: "The only question in the case is whether the plaintiff is entitled to have the satisfaction of the Simmons mortgage set aside, and that he be subrogated to all the rights of Simmons. It seems to us that he is not entitled to such relief. The plaintiff made the loan to Lord for the express purpose of paying the Simmons mortgage. It was well understood that the plaintiff was to accept a new mortgage, and plaintiff got all he bargained for. There was no mistake, except that the plaintiff failed to exercise the diligence required in the examination of the records, and therefore failed to discover the existence of the judgment and the sale thereunder. No one can be blamed, but he must suffer loss, simply because he was negligent. There is no principle that will allow him to take advantage of that to the injury of the diligent." In *Kitchell v. Mudgett*, *supra*, the supreme court of Michigan, speaking to the same point, said: "It is said, with great show of reason, that complainant would never have taken up those mortgages had she not supposed she was to have a first lien, for the land was then worth only about the amount of the three mortgages. Now this may be true, and still it may be equally true that if she has taken a mortgage negligently on land covered by another she can have no relief. Now complainant was notified by the record and by the Phibbs mortgage that Mrs. Mudgett also held one on the same lands, yet it is not claimed that she

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required Mrs. Mudgett to release hers or to postpone the lien. How can the court know that Mrs. Mudgett would have consented to release or postpone if it had been required of her? And how can the court compel her to do that which, with competent authority to assent to or reject, she might perhaps at the time have rejected?" And in *Banta v. Garmo, supra*, the assistant vice-chancellor, speaking to the question under consideration, said: "A further argument is made in behalf of the complainant, on the ground of mistake in canceling the prior mortgage. This is not strictly the fact, as that act was done intentionally, and the mortgagee in that mortgage is content. The mistake consisted in the belief that the complainant was acquiring an unincumbered title by his mortgage. This kind of mistake is of frequent occurrence, but I never heard of an instance where the suffering lender was permitted to trace back his money into the hands of a stranger who had received it in discharge of an elder lien than the one newly discovered, and thereupon to set up such stranger's lien to overreach the intervening incumbrance. * * * No case can be found where a third person, after voluntarily and intentionally discharging a lien in which he had no prior interest, and on the faith of another security, has been permitted, as against other incumbrancers, to revive such lien on ascertaining that his own security was worthless." In the case at bar Rice knew, and was bound to know, when he loaned Winters the money to pay off the Moore mortgage, that Grommes & Ullrich had mortgage liens upon this real estate, and the very moment that the Moore mortgage was satisfied of record that the Grommes & Ullrich mortgage would become a first lien upon the premises. Had he exercised ordinary care and diligence he would have secured from Grommes & Ullrich a valid release and discharge of their mortgage before he advanced the money and paid off and allowed to be satisfied the Moore mortgage. If he has suffered loss or shall suffer

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loss, he has no one to blame but himself, and a court of equity will not apply the doctrine of subrogation to a case, where to do so would be to deprive one party of a legal right and at the same time reward the other party for his negligence.

The decree, in so far as it postpones the lien of Grommes & Ullrich to that of Rice, is reversed, the cause remanded to the district court with instructions to enter a decree giving Grommes & Ullrich a first lien upon the mortgaged premises for the amount found due them by the district court, and give to Rice a second lien upon the premises for the amount found due him by the court.

REVERSED AND REMANDED.

STATE BANK OF CRAWFORD, APPELLEE, V. JOHN
OWENS, APPELLANT, ET AL.

FILED JUNE 19, 1895. No. 5680.

Review: SUFFICIENCY OF EVIDENCE. This appeal presents no question of law. The evidence examined, and *held* to support the finding of the district court, and its decree affirmed.

APPEAL from the district court of Dawes county.
Heard below before BARTOW, J.

Spargur & Fisher, for appellant.

Albert W. Crites and *D. B. Jenckes*, *contra*.

RAGAN, C.

This is an appeal from a decree of the district court of Dawes county rendered in an ordinary action of real estate mortgage foreclosure. The appeal presents no question of law whatever. We have examined the record, and ascer-

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tained that the finding of the district court is supported by sufficient evidence. Its decree is, therefore,

AFFIRMED.

EDWARD F. GALLAGHER ET AL. V. ST. PATRICK'S
CHURCH OF O'NEILL, NEBRASKA.

FILED JUNE 19, 1895. No. 5907.

Building Contracts: CHURCH PROPERTY: INSURANCE: BREACH BY OWNER OF AGREEMENT TO INSURE: LOSS BY FIRE: LIABILITY OF SURETIES ON CONTRACTORS' BOND. Meals & McVea, contractors, entered into a writing with St. Patrick's Church, in and by which they agreed to furnish the labor and material and construct for said church a certain building. The contract provided (a) that the building should be completed by December 31, 1890; (b) that, if the building should not be completed by that time, the contractors should forfeit to the church the sum of \$10 for each day that the building remained unfinished thereafter; (c) that if the contractors should neglect or refuse to comply "with any of the articles of this agreement" the church might take possession of the premises, after giving three days' notice in writing, complete the building, and charge the cost thereof to the contractors; (d) that the architect should make estimates on the last days of August, September, October, and November, of the value of the material and labor furnished by the contractors, and the church at said dates should pay to the contractors three-fourths of the amount of such estimates; (e) that the church should protect by insurance to cover its interest in the property when payments had been made to the contractors. To secure the performance of their agreement the contractors executed a bond to the church, signed by themselves as principals and a number of other parties as sureties. The building was not completed by December 31, 1890, and the contractors were proceeding with its construction on February 18, 1891 when it was totally destroyed by fire. Prior to December 31, 1890, the church had paid to the contractors for labor and material the sum of \$12,440. Prior to the day of the destruction of the building, the church had paid to the contractors

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\$14,489.59. The church took out insurance on the property in the sum of \$10,000 and no more. The church sued the contractors and the sureties on their bond to recover the money paid to the contractors under the contract. *Held*, (1) That the failure of the church to keep the building insured to the extent of its interest therein was a complete defense for the sureties on the bond of the contractors; (2) that the object of the provision in the contract requiring the church to insure its interest in the property was to lessen the risks taken by the sureties; (3) that the sureties were under no obligation to make inquiries from time to time to ascertain if the church had complied with its contract to insure its interest in the property; (4) that the sureties had a right to suppose that the church would comply with its contract in that respect, and that if the building should be destroyed before its acceptance by the church and they were called upon to and did make good the loss, they would be entitled by subrogation or otherwise to the benefit of the insurance effected on the property by the church; (5) that the question as to whether the destruction of the building was the result of the negligence of the contractors was an immaterial issue; (6) that the church could not excuse its failure to comply with its part of the contract on the ground that its performance would have been of no value to the sureties, because the loss of the building through the negligence of their principals would defeat a recovery of the insurance if it had been effected; (7) that its duty was to insure the property, and when the loss sued for occurred and was paid by the sureties, to transfer to them the insurance contracts, and leave the sureties and the insurance companies to litigate the question of the latter's liability; (8) that the fact the church was unable to procure responsible insurance companies to write insurance on the building to the extent of its interest therein did not relieve it from the performance of its agreement to insure the property to the extent of its interest; (9) that it is evident from the contract that it was within the contemplation of the parties thereto at the time it was made that the building might not be completed at the very day fixed by the terms of the contract, and that if it was not, the church had the option to permit the contractors to finish the work and to recover from them whatever damages the church might sustain by reason of the building not being completed in time, or the church might, at its option, exclude the contractors from any further connection with the work and complete it itself; (10) that the church by permitting the contractors, without protest or objection, to continue the work after the date when the building was to be completed, recognized the

contract as in full force, and as long as it was in force the church was under obligation to perform its part of it; (11) that by such act it waived, as it had a right to do, the completion of the building on the day named in the contract, and reserved the right to recover damages from the contractors for the delay.

ERROR from the district court of Holt county. Tried below before BARTOW, J.

See opinion for statement of the case.

B. G. Burbank, for plaintiffs in error :

The church failed to keep its interest in the building insured as required by the contract, and the sureties are released. (*Watts v. Shuttleworth*, 5 Hurl. & N. [Eng.], 235, 7 Hurl. & N. [Eng.], 353.)

Kennedy & Learned, also for plaintiffs in error :

Where a party has undertaken to do a thing, he is not excused from liability by the occurrence of events which render the performance of his promise impossible. (*School District v. Dauchy*, 25 Conn., 530; *Beebe v. Johnson*, 19 Wend. [N. Y.], 500.)

R. R. Dickson and *Blair & Goss*, also for plaintiffs in error.

E. Wakeley, *M. F. Harrington*, and *Thomas Carlton*, *contra*, cited in support of their argument on the question of insurance: 1 Wood, Fire Insurance, 377, 634, 817; *Cone v. Niagara Fire Ins. Co.*, 60 N. Y., 619; *Sansom v. Ball*, 4 Dallas [U. S.], 459; *Putnam v. Mercantile Marine Ins. Co.*, 5 Met. [Mass.], 386; *Imperial Fire Ins. Co. v. Murray*, 73 Pa. St., 13.

RAGAN, C.

St. Patrick's Church is a religious corporation organized under the laws of the state and situate at O'Neill, Ne-

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braska. Meals & McVea, in August, 1890, were contractors and builders, and will hereinafter be referred to as the contractors. In the said month of August said contractors entered into a written agreement with said church, in and by the terms of which they agreed to furnish all the material and erect an academy or school building for said church at said city of O'Neill, according to certain plans and specifications. The contract price for this building was \$16,160.94. The contract contained the following provisions: (a) The architect was required to make estimates on the last days of August, September, October, and November, of the value of the material furnished and labor performed by the contractors towards the erection of the building, and thereupon the church was to pay to the contractors at said date three-fourths of the amount of such estimates; (b) the building was to be completed by December 31, 1890, at which time the church was to pay to the contractors the balance of the contract price; (c) that if the contractors "shall neglect and refuse to carry on the work at any time for two days in the manner required by the architect, or shall neglect or refuse to comply with any of the articles of this agreement," then the church "is hereby empowered to enter upon and take possession of the premises, with the materials and apparatus thereon, after giving three days' notice in writing," and complete said building, charging the costs thereof to the contractors; (d) that if the contractors should fail to complete the building by the time agreed they should forfeit and pay to the church the sum of \$10 a day for every day that the building remained unfinished; (e) that "the owner, the church, shall protect by insurance to cover its interest when payments have been made to contractor." To secure their performance of this contract the contractors gave a bond to the church, signed by themselves and a number of other persons, hereinafter denominated the sureties. Immediately after the execution of this contract the

contractors began the erection of the building and continued working upon the same until February 18, 1891, when the building, almost completed, was wholly destroyed by fire. Prior to December 31, 1890, the church had paid to the contractors for labor and material furnished by them towards the erection of said building the sum of \$12,440. Prior to the time of the destruction of the building the church had paid to the contractors the sum of \$14,489.59. The church took out insurance to protect its interest in the building being constructed to the extent of \$10,000, and no more. The church brought this suit in the district court of Holt county against the contractors and sureties on their bond, and in its original petition claimed a judgment for the sum of \$14,489.59, the total amount paid by the church to the contractors prior to the destruction of the building, but by an amended petition, on which the action was tried, the church claimed a judgment for the sum of \$12,440, the amount paid by it on the contract prior to December 31, 1890. The contractors were not served with process in the action and made no appearance therein. The church had a verdict and judgment against the sureties, to reverse which they have prosecuted to this court a joint petition in error.

There are numerous assignments of error here that the district court erred in giving all of certain named instructions and that it erred in refusing to give all of certain named instructions. We have examined these instructions so far as to discover that some of the instructions given by the court were properly given, and that some of the instructions refused by the district court were properly refused. The assignments of error, then, as to the giving and refusing of instructions are overruled.

Certain assignments of error relate to the action of the district court in the admission and rejection of evidence, but in view of the conclusion reached by us these assignments will not be noticed.

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One of the defenses interposed to the action was that the church had failed and neglected to insure the building to the extent of its interest therein according to the terms of the contract, and that such failure and neglect on the part of the church had released and discharged the sureties. The church met this defense by replying that it had no insurable interest in the building being constructed, and that the amount of insurance which it had taken out on the building was as large a sum as was practicable, or as any responsible insurance company would carry. It is not disputed that the church never had over \$10,000 of insurance on this property. The allegations in the church's reply that it had no insurable interest in the building being constructed is not urged by its counsel here. Is the failure and neglect of the church to insure the building to the extent of its interest therein a defense to these sureties? In *Watts v. Shuttleworth*, 7 Hurl. & N. [Eng.], 253, a contractor had agreed to furnish the material and to "execute the fittings of the first and second floors of a warehouse for the owner" by a certain date, and for a certain sum, payable in installments of not less than twenty per cent as the work progressed. The contractor further agreed that he would provide a store-room for the express purpose of the reception of the fittings from time to time as they were completed and until they were ready to be used in the warehouse; and the contract further provided that the owner should insure these fittings from risk or accident by fire. The contractor entered upon the performance of his contract, and, it appears, had a large number of fittings completed and stored; and while thus in store, and before they were placed in the warehouse, the fittings were destroyed by fire. The owner had neglected to take out any insurance on the fittings. The contractor failed to perform his contract, became insolvent, and the owner brought this suit on the bond to recover the amount of money which he had paid the contractor on the contract. The surety on the con-

tractor's bond interposed the defense that the owner had failed and neglected to insure the fittings as he had agreed. The court, in discussing this defense, said: "The substantial question in the case is, whether the omission to insure discharges the defendant, the surety. The rule upon the subject seems to be that if the person guarantied does not act injurious to the surety, or inconsistent with his rights, or if he omits to do any act which his duty enjoins him to do, and the omission proves injurious to the surety, the latter will be discharged." Judgment was entered for the surety. This judgment was affirmed on appeal, the court holding that the owner was bound to insure the fittings, and that his omission to do so discharged the defendant's liability, not merely to the extent of the benefit he would have derived from the insurance if effected, but *in toto*. (See *Watts v. Shuttleworth*, 7 Hurl. & N. [Eng.], 253.) Applying the rule announced by these cases to the facts of the case at bar we conclude that the failure of the church to insure its interest in the building being constructed is a complete defense for the sureties on the bond of the contractors. To overthrow this defense counsel for the church make several arguments.

The first argument, as we understand it, is that the only damages which the sureties and contractors suffered by reason of the failure of the church to insure its interest in the property is the amount of premium which it would have required to effect this insurance; that the contractors, having ascertained that the church had not insured the property to the extent of its interest, should themselves have taken out the insurance and charged the cost thereof to the church. We do not think this argument is tenable, whether applied to the contractors or sureties, but we are quite clear that it is not sound when applied to the latter. The very object of having the church insure its interest in the property was to lessen the risks taken by the sureties. The sureties were under no obligations to make inquiries

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from time to time to ascertain if the church had complied with its contract to insure its interests in this property. They had a right to suppose that the church would comply with its contract in that respect ; and that if the building should be destroyed before its acceptance by the church, and they were called upon to make good the loss, they would be entitled, by subrogation or otherwise, to the benefit of the insurance effected on the property by the church. By the terms of the contract it was the duty of the church to keep this property insured to the extent of its interest in it. On December 31 it had an interest in the property to the extent of \$12,440. When the property was destroyed its interest in the property was \$14,489.59, or a sum greater than the judgment rendered against the sureties. By the express terms of the contract it was the duty of the church to keep this property insured to the extent of its interest therein, and had it done so, and had the property been destroyed as it was, the sureties, on paying the judgment here, would have been entitled to an assignment of the insurance policies, by subrogation or otherwise, to reimburse themselves for their loss.

Another argument is that the destruction of this building was the result of the negligence of the contractors, and that, therefore, they and their sureties are estopped from insisting upon the defense that the church failed to insure the property to the extent of its interest therein. The reply pleaded by the church to the defense of its failure to insure the property has already been set out. In this reply the church did not plead as an estoppel against the sureties that the property had been destroyed through the negligence of the contractors. It seems, however, that the question as to whether the destruction of the building was the result of the negligence of the contractors was made an important question before the jury. We are at a loss to understand how this question could have been material under the pleadings in the case. The sureties by their

contract agreed that the contractors should furnish material and erect this building according to the plans and specifications and turn it over to the church. The building having been destroyed before it was delivered to the church, the liability of the sureties attached, and whether the building was destroyed by fire, or the act of God, or otherwise, afforded them no defense. (*School District v. Dauchy*, 25 Conn., 530.) It is argued that the destruction of the building by the negligence of the contractors would be a defense to the insurance company in a suit against it on the insurance policies, had the church taken them out; but it is sufficient answer to this argument to say that that is not the case on trial. Whether the negligence of the contractors would be a defense for the insurance companies when sued upon the policies is to be determined when such defense is presented by the insurance companies in such suit. The church cannot excuse its failure to comply with its part of the contract by saying that its performance would have been of no value to the sureties. Its duty was to insure the property, and when the loss sued for occurred and was paid by the sureties, to turn over to them the insurance contracts and leave the sureties and the insurance companies to litigate the question of the latter's liability.

Another argument of the church is that the amount of insurance that it effected on the property was as much as any responsible insurance company would insure the property for. This, as already seen, was a part of the reply of the church to the defense of its failure to insure the property. We do not think this reply a good one in this respect. The church unconditionally contracted to insure the building to the extent of its interest. Having made this agreement, it was bound to perform it; and the fact that it was unable to procure insurance companies to write insurance on the building to the extent of its interest therein does not relieve it from the performance of its agreement. (*Beebe v. Johnson*, 19 Wend. [N. Y.], 500.)

The final argument relied upon by counsel for the church to overthrow this defense is that since by the terms of the contract the building was to be completed and delivered to the church by December 31, and that as it was not finished by that time, the building from that date was at the sole risk of the contractors. This argument, in effect, is that because the contractors failed to complete the building by December 31 the church was released from its part of the contract to keep its interest in the building insured. To sustain this argument it is insisted that the church never granted to the contractors any extension of time for completing the building beyond December 31. Under the contract, if the building was not completed by December 31, the contractors were to forfeit to the church the sum of \$10 per day for each day it remained unfinished; and the contract further provided that in case the contractors failed to comply with "any of the articles of this agreement," one of which was to complete the work as agreed, the church might take possession of it after giving certain notice thereof to the contractors. Reading these two provisions of the contract together, it is evident that it was within the contemplation of the parties at the time the contract was entered into that the building might not be completed at the very day fixed by the terms of the contract, and that if it was not, the church should have the option to permit the contractors to finish the work and to recover from them whatever damages it might sustain by reason of the building not being completed in time; or the church might, at its option, exclude the contractors from any further connection with the work and complete it itself. The building was not completed by December 31, but after that date the contractors were allowed to continue the work without protest or objection, or, at least, the church did not exercise its right to exclude the contractors from the work and finish it itself. After December 31 the church paid to the contractors for labor and material furnished for this building after that date some-

thing over \$2,000. By these acts the church recognized the contract as in full force; and as long as the contract was in force, it was under obligation to perform its part of it. It is very strenuously insisted by counsel for the church that the payments made to the contractors for labor and material furnished after December 31 were made without any authority from the church and not binding upon the church, and that, therefore, the contract was not extended after December 31. It appears from the record that the party who made the payments after December 31 on behalf of the church is the same party who made the payments before that time; but we do not think it is material here whether there was a valid agreement entered into between the church and the contractors to extend time for the completion of this building. By the contract the church had the option, when the 31st of December passed and the building was not completed, to charge the contractors with the penalties provided in the contract for non-completion of the building on time, or to declare the contract at an end so far as the connection of the contractors with the work was concerned, take possession of the building, and finish it itself. It did not exclude the contractors from the work, nor attempt to do so. It permitted them to go on and furnish labor and material, and it made payments to them for such labor and material, and it thereby elected to regard the contract as in full force and effect, and waived, as it had a right to do, the completion of the building on the day named in the contract, reserving the right to recover damages from the contractors for the delay. We conclude, therefore, that the failure of the church to keep the property insured to the extent of its interest therein was a complete defense to the sureties on the bond of the contractor, and that the judgment rendered against the sureties is contrary to law. The judgment of the district court is reversed and the cause remanded.

REVERSED AND REMANDED.

CITY OF BEATRICE V. MICHAEL KNIGHT.

FILED JUNE 19, 1895. No. 6146.

Municipal Corporations: DRAINAGE FOR PRIVATE PROPERTY.

The law does not impose upon a municipal corporation the duty of providing drainage for private property within its limits to prevent an inundation thereof caused by the owner of another lot obstructing a water-course by filling his own lot to conform with the established grade of a street.

ERROR from the district court of Gage county. Tried below before BUSH, J.

E. O. Kretsinger, for plaintiff in error.

Hugh J. Dobbs, *contra*.

IRVINE, C.

The defendant in error recovered a judgment against the plaintiff in error on account of damages sustained by the overflowing of a lot of the defendant in error. It will be necessary to consider only one of the errors assigned. At the opening of the trial the city objected to the introduction of any evidence for the reason that the petition did not state facts sufficient to constitute a cause of action. This objection was overruled, and is the foundation of one of the assignments of error.

¶ The petition averred the corporate existence of the city; that plaintiff was the owner of the south half of lot 6, in block 27; that in 1887, after plaintiff purchased said premises, and while he was occupying the same, the city established a grade for the streets and alleys for that portion of the city, leaving plaintiff's property far below such grade; that one Swigart was the owner of lots 11 and 12, in block 26, which were also below the grade of 1887, and situated on a water-course immediately below the premises

of plaintiff. The petition then proceeded as follows: "That there is a large natural ravine or water-course running down through that portion of said city where plaintiff's premises are situated, and across said blocks 26 and 27 of said city; that said ravine or water-course has its source about two miles east of plaintiff's said premises, and flows in a southwesterly direction through the greater portion of the city of Beatrice into the Big Blue river, and following the channel thereof is about six miles in length from source to mouth; that it has numerous tributaries and has large steep banks on sides and a well defined channel, and with its tributaries forms a natural drainage for all the surface water which falls or accumulates on a large area of land both within and without the corporate limits of said city of Beatrice; that during portions of each year said water-course discharges a large amount of water into the Big Blue river and has existed as a natural water-course from time immemorial, and that the premises of this plaintiff and said Uriah Swigart lie almost wholly within said ravine and are far below the grade established by the engineers of said city; that some time in the spring of 1890 the said Swigart notified the city authorities of said city, and particularly the street committee and street commissioner appointed by the city council of said city, that he desired and intended to fill up and raise the said lots to proper grade, and requested said city council and the said street committee and commissioner to make proper provision to drain off and remove the water whose flow would naturally be impeded and interfered with by his proposed improvements and which would constantly accumulate on the surrounding premises, including the premises of this plaintiff; that thereafter the said Uriah Swigart filled up and raised his said lots to proper grade, and thereby checked, interfered with, impeded, and completely stopped the natural flow of the surface water in said slough or ravine and caused the same to accumulate in large quantities

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on the streets, alleys, and lots lying to the east and north of said block 26, and to completely submerge, inundate, and overflow the said premises of this plaintiff from about the first day of February, 1890, to about the first day of June, in said year, to plaintiff's damage in the sum of \$200; that said city, notwithstanding the notification herein alleged to have been given the proper city authorities by said Swigart, and notwithstanding the repeated notifications given by this plaintiff of the damage and inconvenience to which he was put by the overflowing of said premises as aforesaid, neglected and refused to provide any means of escape for the water so accumulated on plaintiff's said premises, but negligently and carelessly allowed said water to increase and accumulate on the premises of plaintiff aforesaid in large quantities and to stand and become stagnant and to overflow and submerge the said premises of plaintiff from about the first day of February to the first day of June, 1890, to plaintiff's damage to the full amount of \$200 as aforesaid." The petition closed with an averment of the filing of a claim against the city and its rejection.

The petition, it will be observed, amounts to this and nothing more: That the city established a grade for its streets, which, when carried into execution, would leave both plaintiff's and Swigart's lots below grade; that these lots were situated in a water-course, Swigart's below the plaintiff's; that Swigart filled his lots so as to make their surface conform to the established grade of the streets; that by so doing he obstructed the water-course, and thereby caused plaintiff's lot to be inundated, and that the city, although notified of Swigart's proposed action, failed to provide any means for the water whose flow was obstructed by the filling of Swigart's lots to escape. This states no cause of action against the city. Whether Swigart was liable to the plaintiff for his acts, is not involved in this case. To charge the city under this petition it would be

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necessary to hold that there is imposed upon the city, in favor of a property owner, the active duty to provide drainage for his lots, or, in the case of a water-course, the duty to provide an outlet for it, when an individual has obstructed its natural flow. There is no such obligation resting upon the city. It is not charged that the city by any act of its caused the obstruction, merely that it failed to provide means to obviate the damage caused by the obstruction by an individual of the water-course.

REVERSED AND REMANDED.

W. C. TILLSON ET AL. V. GEORGE H. DOWNING.

FILED JUNE 19, 1895. No. 6083.

1. **Corporations: INSOLVENCY: PREFERENCE IN FAVOR OF DIRECTORS.** Directors of an insolvent corporation cannot take advantage of their position to obtain a preference of debts owing by the corporation to themselves. *Ingwersen v. Edgcombe*, 42 Neb., 740, followed.
2. ———: ———: ———. Neither can they prefer debts to third persons for which they are obligated as sureties.
3. ———. These rules do not apply to a solvent corporation. On the contrary, such corporations have the same dominion over their property as individuals.

ERROR from the district court of Buffalo county. Tried below before HOLCOMB, J.

Marston & Nevius, for plaintiffs in error.

R. A. Moore, contra.

IRVINE, C.

This action was replevin by Tillson and Osborn against the sheriff of Buffalo county, the property in controversy

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being certain machinery and other chattels appertaining to a brick yard. The plaintiffs claimed title through a sale made under foreclosure of a chattel mortgage. The sheriff claimed under a writ of attachment by virtue of which he had seized the property in question as the property of the mortgagor. The attaching creditor was substituted for the sheriff as defendant in the action. The controversy turned upon the validity of the mortgage. There was a verdict and judgment for the defendant. The plaintiffs prosecute error.

The facts which the evidence tends to show are as follows: The Kearney Brick Company was in September, 1890, the owner of the property. It was then indebted to the Kearney National Bank in the sum of \$15,000, represented by notes, upon which M. E. Hunter, G. W. Frank, Jr., and S. Y. Osborn, the last named being one of the plaintiffs, were sureties. Frank was vice president, Osborn, secretary and treasurer, and Hunter, general manager of the brick company. The bank insisted upon further security for its claim; whereupon the directors of the brick company authorized notes for \$15,000 to be made to the order of Hunter, Osborn, and Frank, to be secured by a mortgage on all the effects of the company, except brick on hand. These notes and this mortgage were executed, and the notes were indorsed to the bank by the payees and the mortgage assigned to the bank. The persons who conducted the transaction testify that the object of these proceedings was to secure the bank's debt, and that it was given the form it took in order to obtain the indorsement of Hunter, Frank, and Osborn. In January, 1891, the bank proceeded to foreclose the mortgage, and in February the property was sold to Osborn and Tillson, the latter being cashier of the bank. At a later period, not shown very distinctly by the evidence, but presumably after the attachment had been levied, and after the plaintiffs had regained possession of the property by the writ of replevin in this

case, the property was sold to the Electric Brick Company, a new corporation, whose stock was, for the most part, held by Frank and other stockholders of the late company, and organized apparently with a view to making the purchase. Tillson and Osborn paid at the foreclosure sale \$6,000 for the property, which was applied on the brick company's notes; they sold the property to the new company for \$17,000, Frank and another borrowing the money from the bank to make the purchase. Out of this money Tillson and Osborn repaid themselves the amount of their investment with interest, and with the remainder discharged the remaining indebtedness of the late company to the bank. No question of the rights of a purchaser without notice at the foreclosure sale can well enter into this case, because Tillson, as cashier of the bank, and Osborn, as an officer and director of the brick company, had notice of the transaction, and because it was evident from the way in which the property was handled that in purchasing, holding, and disposing thereof they were in reality acting on behalf of the bank and not in their own interest.

Among the instructions was the following, given at the request of the defendant: "You are instructed that a director of a corporation, or a number of directors, cannot convey the property of a corporation to themselves for the purpose of securing them for indorsing notes for the corporation to the exclusion of other creditors." The giving of this instruction is assigned as error. Standing alone, the instruction would be open to the objection that it would lead the jury to believe that the fact that the mortgage was made to Hunter, Frank, and Osborn, instead of to the bank directly, might be of controlling force. But by other instructions the jury was told, and, we think, correctly, that the mortgage might still be valid if made to secure the bank, notwithstanding it took the form of a mortgage to the indorsers, by them assigned to the bank. The principal question arising in regard to this instruction is, how-

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ever, one of much more importance, and calls for a consideration of nearly the whole case on its merits. Is it true that directors may not convey the corporate property to themselves, to the exclusion of other creditors, for the purpose of indemnifying themselves as sureties for the corporate debts? This court has held that contracts between a corporation and its directors, while they will be carefully scrutinized, are not necessarily void. (*Gorder v. Plattsmouth Canning Co.*, 36 Neb., 548.) In that case the corporation mortgaged its property to certain of its directors to indemnify the latter as accommodation makers of notes for the corporation. The transaction was upheld, its good faith being established. On the other hand, it has been held that the directors of an insolvent corporation cannot take advantage of their position to secure a preference for themselves, and a mortgage given to directors under such circumstances was held void. (*Ingwersen v. Edgecombe*, 42 Neb., 740.) We think both these cases are in line with the great weight of modern authorities. If, then, the brick company were insolvent and the mortgage had been made to secure a debt then owing by the brick company to Hunter, Frank, and Osborn, it would be void. Is there a distinction between a mortgage given to secure a debt to the director and a mortgage given to secure a debt to a third person for which the director is surety? In *Bosworth v. Jacksonville Nat. Bank*, 64 Fed. Rep., 615, a very similar state of affairs existed. Hook, the president of a railroad company, having indorsed its note to a bank, made its drafts on another company owing it money for the purpose of securing this note. Soon after the railroad company went into the hands of a receiver. The drawee of the drafts paid the money to the receiver, and the bank filed a petition asking that the receiver be required to pay the amount of the drafts over to the bank. The court held that this was an illegal preference. It will be observed that here the relation of the president to the debt due to the bank was that

of surety, and the case is, therefore, on this feature, precisely in point. The court held "that this difference in Mr. Hook's relation to the railroad company, as compared to that of a creditor proper, would make no difference in the application of the rule in regard to giving preference." *Lippincott v. Shaw Carriage Co.*, 25 Fed. Rep., 577, is to the same effect, as is also *Howe v. Sanford Fork & Tool Co.*, 44 Fed. Rep., 231. (See, also, *Adams v. Kehlor Milling Co.*, 35 Fed. Rep., 433; *Gottlieb v. Miller*, 39 N. E. Rep. [Ill.], 992; *Lowry Banking Co. v. Empire Lumber Co.*, 17 S. E. Rep. [Ga.], 968.) Most of the foregoing are quite recent cases, and as they cite prior authorities, we will not repeat the citations. To the contrary is *Worthen v. Griffith*, 28 S. W. Rep., 286, but that is an Arkansas case governed, evidently, to a large extent, by former Arkansas decisions construing the powers of corporations in the matter of preferences more liberally than they have been construed in most other states; and it is based entirely upon reasoning directly contrary to that upon which *Ingwersen v. Edgecombe* is based. We hold that an insolvent corporation may not convey its property to a creditor for whose debt directors of the corporation are sureties, and that the rule in *Ingwersen v. Edgecombe* forbids not only preferences by directors of their own debts, but also of all debts in which they are interested, and which they would reap a personal advantage by preferring. The instruction, however, is vicious in applying the rule to all corporations, without regard to the question of insolvency. The solvency or insolvency of the brick company was by the instruction entirely withdrawn from the consideration of the jury. *Gorder v. Platts-mouth Canning Co.* and *Ingwersen v. Edgecombe* mark the distinction in such cases. In *Sutton Mfg. Co. v. Hutchison*, 63 Fed. Rep., 496, the opinion is by Mr. Justice Harlan, and is too long for quotation here, but its effect is that so long as a corporation is in active exercise of its functions

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it may, having due regard to the objects of its creation, exercise as full dominion over its property as an individual, but when it becomes insolvent and has no purpose of continuing business its powers are more limited. In the former case it may accept assistance from its directors, and by mortgage, or otherwise, protect them against liability, but in the latter case it will not be permitted to mortgage its property to secure a liability previously incurred to its directors.

The questions we have discussed cover the salient points of the case, and the considerations referred to will be sufficient, we think, to govern further proceedings. Consequently, no further assignments of error will be considered.

REVERSED AND REMANDED.

HOME FIRE INSURANCE COMPANY V. WILLIAM
FALLON.

FILED JUNE 19, 1895. No. 5882.

1. **Insurance: APPLICATION: MISSTATEMENTS: ESTOPPEL.** An insurance company is liable on its policy issued on a written application misstating the facts, where such misstatements were written in the application by the company's agent, the insured having correctly stated the facts and acted otherwise in good faith, not consenting to or knowing of the misstatement.
2. —: **SIXTY DAYS' LIMITATION OF ACTION: WAIVER.** Where an insurance company, either before suit brought or by answer in the action, denies that the policy was in force when the loss occurred, it cannot avail itself of a provision in the policy that no action shall be brought until sixty days after receipt of proofs of loss and adjustment.
3. —: **AGENCY: EVIDENCE.** Evidence set out in opinion held sufficient to establish an agency and also a denial of liability before action brought.

ERROR from the district court of Holt county. Tried below before KINKAID, J.

A. S. Churchill, for plaintiff in error.

M. F. Harrington, *contra*.

IRVINE, C.

The defendant in error was the owner of certain grain in a warehouse in O'Neill. The warehouse and grain were destroyed by fire January 6, 1892. The defendant in error held a policy of \$1,200 in the Home Fire Insurance Company on this grain, and February 1, 1892, brought this action to recover on the policy. He obtained judgment, and the insurance company brings the case here on error.

Plaintiff in error argues in its brief several questions in regard to the admission of evidence. The only assignments of error relating to the subject are as follows: "2. For errors committed on the trial in the admission of the evidence of plaintiff as a witness on his own behalf and at the time duly excepted to by the defendant. 3. The court erred in refusing to strike out the evidence of the plaintiff as a witness upon the motion of the defendant upon his cross-examination, it having been shown by such cross-examination that such evidence was incompetent, to the overruling of which motion the defendant at the time excepted." These assignments are too general to present any questions to this court for review. They do not point out the particular rulings complained of. There were a great many objections overruled during the progress of the plaintiff's examination. There were three motions made to strike out his testimony during his direct examination after questions interposed by the defendant. There was none during his cross-examination proper, although the defendant itself interposed a number of "objections" during the cross-exami-

nation, which so-called "objections" were perhaps in the nature of motions to strike out his direct testimony.

The evidence showed that the policy was based on a written application signed by the insured, wherein, among other things, appeared the following interrogatories and answers: "The stock of merchandise. * * * Average value? \$1,900. How often is inventory taken? Know at all times. Amount of last inventory? \$1,950." One of the defenses pleaded was that these statements were false. The evidence showed that the insured was engaged in buying grain from a number of different persons down to the latter part of December, and that during the same period, and later, he from time to time shipped grain to Chicago. The evidence as to purchases and shipments is very voluminous; and we have not entered upon the calculation necessary to determine just what amount of grain was on hand at different times. Nor is there sufficient evidence as to the value from time to time to enable us to make such a calculation with any degree of exactness. For the purpose of considering the case, we shall assume that the company's contention is true, and that the evidence discloses that there was not \$1,950 worth of grain on hand when the application was made, and that the average amount kept on hand did not reach in value \$1,900. It seems that a Mr. Lyons was the company's agent at O'Neill. He signed the agent's certificate on the application, and he signed the policy. The plaintiff, however, testifies that he applied to James Harrington for the insurance, when he stated to Harrington the amount of grain on hand, but not its value; that Harrington inserted the answers to the questions in the application; that Fallon signed the application without having it read over to him, and without knowing that these representations as to value were contained in it. But evidence as to Harrington's relations to the company is very meager. Fallon speaks of him as the agent of the company, and there is certainly sufficient similarity in the handwriting in the

application, in the agent's certificate on the application, and in the body of the policy itself to warrant the jury in believing that it was all done by the same person. It appears that Harrington lived at O'Neill; it does not appear as stated in the company's brief that he had left the country. Both Lyons and the company's adjuster were on the witness stand, and do not contradict Fallon's statement that Harrington was an agent, nor his statement that the application was made to Harrington. Harrington seems to have been enough the company's agent to procure the policy to be issued. The company, on an application to Harrington, issued the policy and received the premium, and we think that, in the absence of any evidence to the contrary, the foregoing was sufficient to establish the fact of his agency for the company in writing policies.

The court instructed the jury, in effect, that the plaintiff could not recover if he authorized the statement as to the value of the grain, or if he knew when the application was delivered; that it contained such statement; but that the plaintiff was responsible for the statement if Harrington was not the agent of the company, or assisting or co-operating with Lyons. The court refused to instruct, at the request of the company, that unless the representations were substantially true there could be no recovery. The refusal of this instruction is assigned as error. To have given it would have bound the insured by the statements in the application, even if they had been made by the agent of the company without the consent or knowledge of the insured. This is not the law. Indeed counsel for the insurance company frankly admit "that there are many decisions holding that where a party applies to an agent for insurance, and correctly states the facts, the company is liable, although the agent may not write in the application the answers given by the insured." *State Ins. Co. of Des Moines v. Jordan*, 29 Neb., 514, recognizes this principle. It is true that in that case it appeared that the in-

sured was unable to read. But we do not think the distinction in the cases material. When the insured states the facts correctly to the company's agent, he is not bound to exercise vigilance thereafter to determine whether the agent is exercising care or good faith in his transactions on behalf of the company. In other words, the company is estopped from seeking to avoid its contract because of a mistake or fraud committed by its own agent, the insured having acted in good faith, although, perhaps, somewhat negligently.

In this connection it is also argued that the court erred in permitting the plaintiff to amend his pleading so as to introduce this issue in the case. But there is no assignment of error reaching this point.

The policy contained a provision that the loss should be payable sixty days after due notice, ascertainment, estimate, and satisfactory proof of the loss had been received by the company, and that no action should be maintained within that time. This suit was brought in less than thirty days after the fire. The jury found specially that prior to the commencement of the action the company had denied all liability upon the policy. It is clearly the law that such denial of liability prevents the company from insisting on this provision. (*Hoffecker v. New Castle County Mutual Ins. Co.*, 5 Houst. [Del.], 101; *Allegre v. Maryland Ins. Co.*, 6 H. & J. [Md.], 408; *State Ins. Co. v. Muackens*, 38 N. J. Law, 564; *Williamsburg City Fire Ins. Co. v. Carey*, 83 Ill., 453; *Cobb v. Ins. Co. of North America*, 11 Kas., 93; *California Ins. Co. v. Gracey*, 15 Col., 70.) The company, however, while tacitly recognizing this principle, contends that the proof was insufficient to sustain the special finding of the jury. The plaintiff testifies that he gave immediate notice of loss to the company; that sometime afterwards he was accosted by one Denman, who is shown to be the company's adjuster, and after some talk about the fire, Denman said, to use Fallon's language, "He was onto me;" that he had been in O'Neill several days investigat-

ing the matter, and had affidavits of thirty-two men to prove that there was not the amount of grain there which was claimed, and that Fallon had left for the purpose of having the building burned, and he also told Fallon that the latter knew who did burn the building, and that he afterwards made the proposition "that if you let this case go by—if you would not bother with the Home Fire Insurance Company—I will give you the affidavits of these thirty-two men to show who are your friends." Fallon met him again and asked him "Will you admit that I had any loss?" He said, "I will if you will admit that Mr. Hayes had an interest in the property." According to the terms of the policy this fact, if established, would defeat a recovery. On the 12th day of January Fallon executed an affidavit in the nature of proofs of loss. This affidavit stated "that the property destroyed and its cash value was as follows:

481 bushels of rye, worth.....\$322.27

870 bushels of oats, worth..... 174.00

477 bushels of corn, worth..... 119.25

748 bushels of wheat, worth..... 501.16

that all of said property was insured by said policy, and was totally destroyed; that there were no incumbrances on said property, and that there was no other insurance on said property, that he was the only person who occupied the building described in said policy, and in which the property destroyed by said fire was situated at the time of the fire." It was after this proof was furnished that the adjuster appeared. The policy required that the proofs should state, among other things, the "cash value of each item thereof [meaning the property destroyed], and the amount of loss thereon. * * * Any change in the title, use, occupation, location, position, or exposures of said property since the issuing of this policy. By whom, and for what purpose any building herein described and the several parts thereof were occupied up to the time of

the fire." So far as we can see, the proofs furnished by Mr. Fallon answered these requirements. But the company returned them for the very absurd and untenable reason "that they do not show the market price of the various kinds of grain at O'Neill, Nebraska, claimed to have been damaged or destroyed by said fire, nor the purpose for which the building containing such grain was used." It is true that this last letter was not written until after the suit was brought, but it indicates the disposition of the company in regard to the loss. The adjuster demanded an inspection of Fallon's books and papers. Fallon testifies that he said he would submit them for examination if liability under the policy were admitted. The adjuster would not admit liability, but insisted upon ascertaining the amount of the loss before doing so. In one letter from the company Mr. Fallon is told that it is absurd in him to assume that the company must admit liability before ascertaining whether any liability exists. This hardly states Mr. Fallon's position correctly. The absurdity was rather in the company's insisting upon examining Mr. Fallon's private accounts without admitting a contractual relation with him which would justify such an examination. On the whole evidence there can be no doubt that what had occurred prior to the bringing of the suit was sufficient to convey to Mr. Fallon the information that the company did not intend to pay the loss. It justified the jury in reaching the same conclusion, and we think the special finding was amply supported. It has been held that when a company denies liability on the ground that the policy was not in force when the loss occurred, this is a waiver of all requirements as to notice or proofs of loss. (*Phenix Ins. Co. v. Bachelder*, 32 Neb., 490; *Omaha Fire Ins. Co. v. Dierks*, 43 Neb., 473, 569; *German Insurance & Savings Institution v. Kline*, 44 Neb., 395; *Dwelling-House Ins. Co. of Boston v. Brewster*, 43 Neb., 528.) So held where the denial of liability is contained in the answer, and was not made before action

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brought. (*Omaha Fire Ins. Co. v. Dierks, supra.*) The reason of this is that the company cannot be permitted at the same time to say that the policy was not a valid and existing contract, and claim privileges derived only under the contract. We think the same principle applies to this case. The company showed by the action of its agent before the suit was brought that it was endeavoring to escape liability, and intended to avoid its obligations if possible. When sued it pleads that the policy was procured through misrepresentation, and was, therefore, not a valid contract. As said by Judge Brewer in the Kansas case already cited, the sixty days provision is merely a contract for credit, and the company certainly cannot avail itself of a provision for such credit when that provision is a part of a contract which the company claims is not in force.

JUDGMENT AFFIRMED.

GEORGE THOMPSON, APPELLEE, v. JOHN C. LUKE,
APPELLANT, ET AL.

FILED JUNE 21, 1895. No. 5908.

Conflicting Evidence: REVIEW. A judgment or decree based upon conflicting evidence will not be disturbed by this court unless clearly wrong.

APPEAL from the district court of Douglas county.
Heard below before SCOTT, J.

Montgomery, Charlton & Hall, for appellant.

F. W. Fitch, contra.

POST, J.

This is an appeal from a decree of the district court for Douglas county, the facts essential to an understanding

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of the questions at issue being as follows: On the 23d day of December, 1891, the plaintiff, as assignee of Robertson & Harris, commenced this action in the district court to enforce a mechanic's lien against certain lots in Luke & Templeton's addition to the city of Omaha for labor furnished and performed by his assignors under a contract with the defendant, John C. Luke. Henry & Frey, who claim as subcontractors under Robertson & Harris, and Allen A. Lambert, who claims under a contract with Luke, were made defendants, and filed cross-bills for the purpose of asserting liens against the property described in the petition. There was a finding and decree against Luke in favor of the several parties claiming adversely to him, from which the former has appealed to this court.

The petition and several cross-petitions are based upon verbal contracts with Luke for the furnishing by Robertson & Harris, and Lambert, of labor in the erection of buildings on the lots above mentioned. Luke answered the several petitions (1) by a specific denial of the alleged verbal agreement, and (2) by an allegation that all labor furnished and performed by said contractors was under and by virtue of written agreements, which are set out at length. Plaintiff in reply admits the written agreement alleged, but says: "That after the memorandum or contract in defendant's answers set forth was signed and entered into, the same was wholly set aside, rescinded, destroyed, and made null and void by agreement of the parties thereto, and before any work or labor was done and performed as set forth in the plaintiff's petition, and thereupon, shortly thereafter, a verbal contract was made and entered into between the said J. C. Luke and Robertson & Harris, whereby said houses were to be built on other and different lots, * * * whereby other, larger, and more expensive houses were to be built, and more and extra work required and done, and whereby said J. C. Luke promised and agreed to pay the said Robertson & Harris for the time they and their em-

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ployes put in, used, and labored in the construction of said buildings." The cross-petitioners in reply deny the several allegations of the answers.

The question first presented relates to the agreements under which the labor was performed. It is earnestly contended that the finding for the appellees upon that issue is against the weight of the evidence; but an examination of the record fails to sustain that contention. The claim of the plaintiff is sustained by a decided preponderance of the evidence, while the most that can be claimed as to the finding for the cross-petitioners is that the evidence is conflicting, but not warranting a reversal on this appeal. An analysis of the evidence in connection with the statement of the accounts by counsel for the respective parties has satisfied us that all items not clearly chargeable under the contracts were rejected by the district court and that the decree should accordingly be

AFFIRMED.

CITY OF WAHOO, APPELLEE, V. NATHAN D. THARP ET AL., APPELLANTS.

FILED JUNE 21, 1895. NO. 5758.

1. **Towns and Villages: EXTENSION OF BOUNDARIES.** The boundaries of a town or village may, under the provisions of section 99, chapter 14, Compiled Statutes, be extended so as to include adjacent lands, provided said territory is in such close proximity to the platted portion as to have some unity of interest therewith in the maintenance of municipal government. (*State v. Dimond*, 44 Neb., 154.)
2. —: **ANNEXATION OF TERRITORY: EVIDENCE.** Evidence examined, and held to sustain the judgment of the district court annexing certain adjacent lots and subdivisions of land to a city of the second class.

APPEAL from the district court of Saunders county.
Heard below before BATES, J.

Good & Good and Simpson & Sornborger, for appellants.

H. Gilkeson, *contra*.

POST, J.

This was a proceeding in the district court of Saunders county by the city of Wahoo, under the provisions of section 99, chapter 14, Compiled Statutes, having for its object the annexation to said city of certain adjacent lots and subdivisions of land. The basis of the proceeding is a resolution of the city council, wherein is recited that "it is deemed by the city of Wahoo to be advisable and for the best interests of said city that said contiguous territory be annexed to and made a part of the city of Wahoo; that we demand as of right the annexation to said city of the contiguous territory described as follows: * * * ." Upon the adoption of said resolution a petition was presented to the district court by the city, praying for an order extending its boundaries so as to include the lots and subdivisions therein described and alleging, as grounds therefor, that "said property, or a large part thereof, is laid out and platted into building lots, and largely occupied by residents thereon, who, if annexed as prayed, will receive the police protection and the protection of the fire department of said city; * * * that the lands and lots aforesaid contiguous to the plaintiff have been greatly enhanced in value by reason of their proximity to said city, but that the owners and residents thereon have not borne any of the expenses and burdens incident to the city government, although deriving great advantage therefrom." The numerous answers contain substantially the same allegations, viz., that the several lots and subdivisions are used for the purpose of agriculture, pasture, and gardening; that they would be in

nowise benefited by being annexed to said city, and that it would be inequitable and unjust to charge the owners and residents thereof with the expenses of city government. It is also alleged that in the year 1887 a like proceeding was had by the city for the purpose of annexing the same territory; that the city therein alleged the same facts as are now charged, and that said allegations were all put in issue by answers as in this case; that upon final hearing the issues were all determined in favor of the defendants, and the petition dismissed at the cost of the city, which judgment has never been reversed or modified. The city, by way of reply, admitted the former proceeding and judgment, but alleged that subsequent to the date of said judgment the city has constructed an extensive and complete system of water-works, ample for the supply and protection of the city and the territory sought to be annexed; that it has since said date extended its streets, sidewalks, and crosswalks to and in the near proximity to said territory; that it has within said time extended its street lights to the vicinity of said property at great expense, and that the population of said city has, during said period, greatly increased. A hearing was had, resulting in a general finding for the city, and a judgment thereon, from which the defendants have prosecuted an appeal to this court.

As the principal reliance of the appellants is upon the former judgment it is pertinent to inquire what is the effect of the allegations of the pleadings so far as they relate to that subject. It is conceded that the doctrine of estoppel by judgment is applicable to the case at bar, provided the present conditions are substantially the same as those existing at the date of the judgment relied upon. It seems, therefore, that the answer is sufficient as a plea of *res judicata*. The allegations of the reply amount to no more than a denial of the plea of the answer, leaving the burden of that issue upon the defendants.

It is shown by the plat accompanying the record that the

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tracts of land in question are lots ranging in size from one and a half to eight acres, all adjoining the city and contiguous to platted additions thereto. The evidence adduced on the part of the city tends to prove that subsequent to the former judgment it has constructed a system of water-works, including four or five miles of mains, with forty-seven fire hydrants; that it has the customary fire department which is supplied with carts, hose, etc., and that the buildings situated on said lots are, with few exceptions, within the protection afforded thereby; that there has been a considerable increase of the city's population, resulting in an extension of the streets and sidewalks, which are in constant use by the owners and residents of said tracts. Some of the foregoing propositions are controverted by the defendants, but the court evidently found that the former judgment was based upon conditions substantially different from those disclosed by the proofs, and that conclusion has ample support in the record. It was held in *State v. Diamond*, 44 Neb., 154, that lands adjacent to a town or village may be incorporated therewith, provided they are in such close proximity to the platted portions as to have some unity of interest in the maintenance of municipal government, and such, judging by the record, is the rule which was recognized by the district court.

It is argued that there is no competent evidence of the adoption of the necessary resolution by the city council. The record introduced in evidence over the objection of the defendants shows the adoption of a resolution in due form, but it is contended that there was no foundation therefor, since it does not appear that the meeting in question was a regular one, or, if a special meeting, that it was called in the manner prescribed by law; but by reference to the record of said meeting we observe: "The council met in regular session. On roll call the following members were found to be present." We can conceive of no foundation which could be laid to add authenticity to the record re-

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quired by law to be kept, and which is the best, if not the only, evidence of the proceedings of the city council. There being no error apparent from the record the judgment will be

AFFIRMED.

JACOB RIPP V. DAVID A. HALE.

FILED JUNE 21, 1895. No. 6201.

1. **Contracts: AGREEMENTS FOR BENEFIT OF THIRD PERSONS: ACTIONS.** As to the points decided in this case on a former hearing in this court, opinion reported in the 32 Neb., 259, the conclusion and rule therein announced are at this time followed and adhered to.
2. **Trial.** A ruling of the trial court excluding certain evidence examined, and *held* not erroneous.
3. **Sufficiency of Evidence.** Evidence *held* sufficient to sustain the verdict.

ERROR from the district court of Platte county. Tried below before MARSHALL, J.

Albert & Reeder, for plaintiff in error.

Robinson & Reed, *contra*.

HARRISON, J.

This case was commenced in the district court of Platte county by D. A. Hale to recover from Jacob Ripp the amount of a subscription alleged to have been made by him in favor of one Henry Gebecke and assigned to D. A. Hale. The case was tried before the court and a jury, and at the close of the testimony a verdict was directed for the defendant. The case was brought to this court for review and the judgment reversed and the case remanded. The decision then filed is reported in 32 Neb., 259, and to it we

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refer for a statement of the cause of action. It was then held: "That the questions of fact involved in the case should have been submitted to the jury, and the court erred in directing a verdict. Where a party makes a promise to another for the benefit of a third person, such third person may avail himself of the promise and bring an action thereon, although the consideration did not move directly from him." At a second trial of the case in the district court, by agreement of parties the cause was submitted upon the evidence taken during the former trial, no new evidence being offered by either party, the only change made being, that on objection by plaintiff, "Exhibit E," page 367 of the deed record, a copy of a deed from plaintiff and wife to the Fremont, Elkhorn & Missouri Valley Railroad Company, conveying to it some seven acres of the land deeded by Gebecke to Hale as agent for the company and which had been admitted at the former trial, was at the time excluded. There was a verdict by the jury in favor of the plaintiff, and after motion for new trial on behalf of defendant was heard and overruled, judgment was rendered in accordance therewith. To review the proceedings during the second trial the case is again presented to this court.

The district court in the second trial of the case obeyed the direction of this court as embodied in its opinion rendered at the former hearing, and its action in so doing was the only correct and proper one, and in so far as the former adjudication of the case in this court related to the facts developed during the trial, and their sufficiency to require a submission of the issues to the jury for their consideration and determination, it will not now be re-examined but will be adhered to. The rule of law which was announced in the former decision as being applicable to the facts became the law of the case and must now be allowed to govern in its disposition, and, viewed in the light of such rule, the evidence was sufficient to sustain the verdict rendered.

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It is insisted that the trial court erred in excluding from the evidence the page of the deed record which, if admitted, would have shown that the plaintiff executed a conveyance to the Fremont, Elkhorn & Missouri Valley Railroad Company of about seven of the forty acres of land conveyed to him as agent for the company. We do not think the court erred in its action as to this piece of evidence. The land was conveyed to plaintiff, not for himself, but as agent for the railroad company. What they did with it or in relation to it afterward could not and did not affect the liability of the defendant upon this subscription, nor tend in any manner nor to any extent to aid the jury in a determination of any of the issues submitted to them. Hence, what would have appeared had this evidence been received, would have been without weight in deciding the questions passed upon by the jury, and it was not error to exclude it.

It is urged that the court erred in refusing to give paragraphs 1, 2, 3, 4, 5, and 6 of instructions asked by defendant. It is the established rule of this court, that under such an assignment, the instructions refused will be examined no further than to ascertain that the action as to any one of them was proper or correct. The instructions referred to were mainly directed to presenting to the jury the contrary view of the law applicable to the case from the one stated in the former decision, and two or three, if not all of them, were clearly erroneous.

Another assignment of the motion for a new trial was as follows: "The court erred in giving paragraphs 2, 3, and 4 of its charge to the jury." Instruction numbered 3 is not erroneous. This being determined, we need not examine the instructions further, as an assignment that the trial court erred in giving a group of instructions will be considered no further when it appears that any one of them was properly given. The judgment of the district court is

AFFIRMED.

POST, J., not sitting.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY
v. JOHN W. HOWARD.

FILED JUNE 21, 1895. No. 6295.

1. **Fellow-Servants: BRAKEMEN: NEGLIGENCE: DAMAGES.** A brakeman is a fellow-servant of another brakeman when both are employed upon the same train; and an accident which happens to one solely by reason of the negligence of the other does not render liable for consequent damages the common employer of both.
2. ———: **DEFECTIVE APPLIANCES: NEGLIGENCE OF SERVANT.** The happening of an accident through the displacement of a draw-bar or coupler of a designated kind or design, is not sufficient proof that such kind or design of appliance is defective, when the displacement complained of is clearly shown to have been caused by the negligent and reckless manner in which the car equipped with such coupler or draw-bar was violently pushed against another car.
3. **Physicians and Surgeons: EMPLOYMENT BY VOLUNTEERS: MALPRACTICE: LIABILITY OF EMPLOYER FOR DAMAGES.** A surgeon is required in the exercise of his profession to employ only that degree of knowledge and skill ordinarily possessed by members of the same profession. Where one as a volunteer undertakes to provide necessary surgical services for another, he cannot be held liable in damages for the negligence or malpractice of such surgeon as he summons, provided such surgeon possesses the knowledge and skill ordinarily possessed by other surgeons, and the employer had no reason to suspect that such surgeon would neglect or fail to use his knowledge and skill to the advantage of his patient.

ERROR from the district court of Adams county. Tried below before BEALL, J.

The facts are stated by the commissioner.

T. M. Marquett, J. A. Kilroy, and J. W. Deweese, for plaintiff in error:

We contend that under the evidence and the findings of

the jury the plaintiff below was not entitled to recover anything. It is clear that the accident was caused solely by reason of the fact that the plaintiff himself left the coal car too close to the switch track, and being thus the efficient cause of the accident himself, he cannot recover for the result of the injury. If plaintiff was free from fault he cannot recover, because the brakemen were fellow-servants. (*Newman v. Chicago, M. & St. P. R. Co.*, 44 Am. & Eng. R. Cases [Ia.], 555, and authorities cited; *Chicago, St. P., M. & O. R. Co. v. Lundstrom*, 16 Neb., 258; *Ell v. Northern P. R. Co.*, 48 N. W. Rep. [N. Dak.], 222; *English v. Chicago, M. & St. P. R. Co.*, 24 Fed. Rep., 906; *Highland Avenue & B. R. Co. v. Walters*, 8 So. Rep. [Ala.], 360; *Muldowney v. Illinois Central R. Co.*, 36 Ia., 466; *Davis v. Detroit & M. R. Co.*, 20 Mich., 128; *Brady v. Ludlow Mfg. Co.*, 28 N. E. Rep. [Mass.], 901.)

The jury made a special finding to the effect that the cause of the accident was the fact of leaving the coal car so close to the switch that the stock car would not pass, and that otherwise the accident would not have happened. We claim that the special finding governs in preference to the general verdict, and that the court should have rendered judgment in favor of the defendant below on the special finding of the jury. (*Baird v. Chicago, R. I. & P. R. Co.*, 7 N. W. Rep. [Ia.], 460; *Korrady v. Lake Shore & M. S. R. Co.*, 29 N. E. Rep. [Ind.], 1071; *Rice v. City of Evansville*, 108 Ind., 7; *Lake Shore & M. S. R. Co. v. Pinchin*, 13 N. E. Rep. [Ind.], 677; *Thompson v. Cincinnati L. & C. R. Co.*, 54 Ind., 201; *Ogg v. Sheehan*, 17 Neb., 323; *Marx v. Kilpatrick*, 25 Neb., 118; *Bierbower v. Polk*, 17 Neb., 275.)

After the testimony of plaintiff was in, showing the accident would not have happened but for the fact that he had left the coal car too close to the switch track, and showing that was what caused the collision and the injury, the defendant moved the court for a nonsuit, which the court

erroneously overruled. (*Flemming v. Western P. R. Co.*, 49 Cal., 257; *Davis v. Detroit & M. R. Co.*, 20 Mich., 128; *Hart v. Peters*, 13 N. W. Rep. [Wis.], 219; *Hobson v. New Mexico & A. R. Co.*, 11 Pac. Rep. [Ariz.], 545; *Burlington & M. R. R. Co. v. Wendt*, 12 Neb., 76; *Manzy v. Hardy*, 13 Neb., 36; *Osborne v. Kline*, 18 Neb., 314.)

We do not concede that there was maltreatment on part of the physicians, but if there was, the company is not liable for damages. (*City of Crete v. Childs*, 11 Neb., 252; *Union P. R. Co. v. Artist*, 60 Fed. Rep., 365; *Atchison, T. & S. F. R. Co. v. Zeiler*, 38 Pac. Rep. [Kan.], 282; *Pullman Palace Car Co. v. Bluhm*, 109 Ill., 24; *Lyons v. Erie R. Co.*, 57 N. Y., 489; *Stover v. Bluehill*, 51 Me., 443; *Locser v. Humphrey*, 41 O. St., 378.)

Dilworth & Smith, also for plaintiff in error.

Capps & Stevens, contra:

In support of the argument that there was such negligence on part of the company in failing to furnish proper machinery and appliances as to make it liable for damages, counsel for defendant in error cited the following authorities: *Grand Trunk R. Co. v. Cummings*, 106 U. S., 700; *Delude v. St. Paul City R. Co.*, 56 N. W. Rep. [Minn.], 461; *Farwell v. Boston & W. R. Co.*, 4 Met. [Mass.], 49; *Cayzer v. Taylor*, 10 Gray [Mass.], 274; *Hamilton v. Rich Hill Coal Mining Co.*, 18 S. W. Rep. [Mo.], 977; *Houston & T. R. Co. v. Oram*, 49 Tex., 341; *New Jersey & N. Y. R. Co. v. Young*, 49 Fed. Rep., 723; *Taylor v. Missouri P. R. Co.*, 16 S. W. Rep. [Mo.], 206; *Galveston H. & S. A. R. Co. v. Garrett*, 13 S. W. Rep. [Tex.], 62; *McCully v. Clarke*, 40 Pa. St., 402; *Salmon v. Delaware, L. & W. R. Co.*, 9 Vroom [N. J.], 11.

As to the liability of the company for the malpractice of the physicians the following authorities were cited by defendant in error: *Mowrey v. Central City R. Co.*, 66 Barb.

[N. Y.], 46; *Townley v. Chicago, M. & St. P. R. Co.*, 53 Wis., 633; *Shearman & Redfield, Negligence*, secs. 438, 439, 441.

RYAN, C.

1. This action was brought by the defendant in error in the district court of Adams county for the recovery of damages alleged to have been sustained by defendant in error solely through the negligence of the plaintiff in error. In the petition two railroad companies were named as defendants, but as these designations seem to refer to but one company, we shall hereafter speak of the defendants as a single entity. Plaintiff in the district court was a brakeman on a freight train, of which the runs, always made in daylight, were between Hastings and Lincoln. On June 29, 1891, this train, on its way from Hastings to Lincoln, stopped in the afternoon at Dorchester. There it was required that a loaded thirty-ton coal car should be switched from a side track into the train to be hauled to Lincoln. This was done by placing the coal car upon the main track and, after the switch had been turned for the purpose, shoving the coal car back upon the main track beyond the switch. The place where the coal car could be safely left on the main track was, by signals, indicated by brakeman Morledge, who turned the switch as required, and the coal car was left at a point thus indicated by him. Owing to some inadvertence, or perhaps some miscalculation of this brakeman, the coal car was permitted to come to a stop at a point so near the switch that a car passing on the side track would not clear it. It is claimed it was not known to plaintiff that the coal car was left at such a point as to render probable an injury to any one riding on a car along the side track, and that if to such a person an injury happened by reason of a collision with the coal car the railroad company should be liable for resulting damages.

2. After the coal car had been disposed of, the plaintiff,

under directions of the conductor, undertook to place a stock car opposite a certain chute on the side track. Mr. Morledge, after adjusting the switch, signaled for the engine to be backed rapidly. This signal was communicated to the fireman, who in turn signaled to the engineer, and the backing was promptly done as required. Plaintiff stepped upon the platform of a car between the stock car and the engine, known as the "show car." This was an old passenger car equipped with a Miller coupler and was used by a traveling party of show people. Mr. Morledge, when the nearest platform of the show car reached him, stepped upon said platform just as plaintiff, having reached the stock car just ahead of the show car, was attempting to reach the ladder for the purpose of climbing to the top of the stock car that he might there manage its brakes. His right foot was on the hand-rail on the corner of the stock car. At this instant there was a collision between the corner of the stock car moving at the rate of about seven miles per hour and the coal car standing on the main track. By the resulting jolt the draw-bar of the show car was bent out of shape, and for some reason, not satisfactorily explained, the Miller coupler struck the iron rod on which rested the plaintiff's foot in such manner as to catch plaintiff's said foot between said iron rod and the end of the show car, and at the same time bent the rod against said foot and greatly bruised it. In argument it is urged that the railroad company was negligent in permitting to be placed in its train the show car, equipped as it was with a Miller coupler.

3. The injured man was taken to Hastings on the first passenger train going westward. In the petition it was alleged that immediately after plaintiff's arrival in Hastings the railroad company's yardmaster at that place summoned Dr. Chapman, who made an examination of plaintiff's injuries and said he thought he could save the foot, and that "thereafter Dr. Chapman, of Hastings, Dr. Livingstone,

of Plattsmouth, and Dr. Denny, of Lincoln, both and all of whom were duly authorized agents, physicians, and surgeons of and in the employ and pay of defendants, then and thereafter, as will be more fully told herein, took full and complete charge of plaintiff's injury and case. Plaintiff further alleges the fact to be that the said Chapman, Denny, and Livingstone, the physicians and surgeons above named, agents of defendants, are each and all of them men who possess as well as profess a high degree of skill, ability, and knowledge of medicine and surgery." Following the above quoted language it was averred, in effect, that by reason of the neglect of said surgeons to amputate his injured foot, plaintiff was caused to suffer much pain, and that finally the said amputation was negligently performed. On account of the aggravation of plaintiff's sufferings through the alleged negligence of the aforesaid surgeons he claimed he should recover damages against the railroad company. On his aforesaid causes of action there was a verdict and judgment for \$6,000.

4. It is observable that there was no complaint in the petition that Mr. Morledge was not a careful, competent brakeman. From the fact that this brakeman did not signal so that the coal car should be placed on the main track beyond the reach of a car on the side track, it is however urged that the railroad company should be held liable. That this proposition must have been approved by the district court is evident from the fact judgment was rendered on the general verdict, notwithstanding the answers of the jury to special interrogatories numbered 1 and 3. These are as follows:

"1. Was the plaintiff injured by reason of the coal car being left on the main track so close to the switch as not to leave room for the cars to pass by on the switch without collision? Ans. Yes."

"3. Would the accident have happened if the coal car had been left at a sufficient and safe distance from the

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switch so as to leave room for the cars to pass in on the side track without striking the coal car? Ans. No."

There is no question made, nor is there room for doubt, that Mr. Morledge and the defendant in error were fellow-servants in the strictest legal sense of that term. They were employed in the management of the same train, and every consideration which operates to exonerate the employer from liability for an injury sustained by an employe, owing entirely to the negligence of a co-servant, applies with full force. (See *Youll v. Sioux City & P. R. Co.*, 66 Ia., 346; *Chicago & A. R. Co. v. Rush*, 84 Ill., 570; *Atchison, T. & S. F. R. Co. v. Plunkett*, 25 Kan., 188; *Besel v. New York C. & H. R. R. Co.*, 70 N. Y., 171; *Houston & T. C. R. Co. v. Gilmore*, 62 Tex., 391.) The fact that there was negligence, and that it was the sole cause of the injury, was fixed beyond peradventure by the above special findings of the jury. It is provided by section 294 of the Code of Civil Procedure: "When the special finding of facts is inconsistent with the general verdict, the former controls the latter, and the court may give judgment accordingly." Under the admitted facts, and those which, with the same binding effect, had been established by the above special findings of the jury, there was error in rendering judgment in accordance with the general verdict.

5. There was no evidence that the railroad company was guilty of negligence in permitting to be placed upon its line of railroad the show car, on account of any of its parts being out of repair. Such criticism as has been offered has been with reference to the alleged fact that the Miller coupler was one of bad design. There was no proof of this claim other than such inferences as were drawn from the fact that at the time the stock car, moving at the rate of seven miles per hour, was suddenly brought to a stop by the loaded coal car, it caused the Miller coupler, or rather the draw-bar connected with it, to become bent, and

to this circumstance the injuries of the defendant in error were attributable. There was no evidence whatever that any other kind of a coupler or draw-bar would have sustained, without displacement, the shock to which this was subjected. What we are asked to sanction is, the proposition that when this accident happened, the mere fact that the Miller coupler or draw-bar struck the foot of the defendant in error justified an inference that this coupler or draw-bar was therefore dangerous. There was undisputed testimony given by Mr. Morledge that, in view of complaints of the inmates of the show car as to the rough handling of their car, defendant in error had suggested to this witness that said show people be given "a damn good shaking up." It would seem that, speaking after the manner of men, this was quite successfully accomplished; and yet there is no known rule which requires that railroad companies, by the use of appliances of unusual design or strength, should anticipate and provide against the result of such pranks. It was laid down by the majority opinion in *Chicago, B. & Q. R. Co. v. Landauer*, 36 Neb., 642, that the inference of negligence against a railroad company must be a reasonable one, and that, where it is impossible to infer negligence from established facts without reasoning irrationally and contrary to common sense and the experience of average men, there is no question for the jury, and the court should direct a verdict for the defendant. In *Kilpatrick v. Richardson*, 40 Neb., 478, it was held that the presumption of negligence, where entertained, must be from proved and conceded facts, and from such, must be the logical, reasonable, and probable deduction. There was no evidence which justified the submission of this case to the jury because of negligence on the railroad company's part, which caused or contributed to the infliction of the injury complained of.

6. It is, however, urged that the railroad company should be held liable for the alleged malpractice of its sur-

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geons. The fifth and sixth special interrogatories, with their respective answers thereto by the jury, were in this language:

"5. Do you find that the plaintiff is entitled to recover on account of the medical treatment that he received after the accident? Ans. Yes.

"By court: Do you find that the plaintiff is entitled to recover for both the accident and the medical treatment? Ans. Yes."

It has already been shown that the railroad company had been guilty of no negligence contributing to the accident whereby the defendant in error was injured, wherefore, at the time when its alleged surgeons were called in a professional capacity to attend upon the defendant in error, the situation was as though the summoning of these professional gentlemen had been by an individual or corporation not engaged in operating a railroad. It was alleged in the petition that the surgeons, who in an alleged unskillful manner amputated the foot of the defendant in error, were at that time "duly authorized agents, physicians, and surgeons of and in the employ and pay of defendants, then and thereafter." This, if true, entitled the railroad company to demand the rendition of such surgical aid for its employes as it chose to require in their behalf. Since it was alleged in the petition that the yardmaster was duly authorized to call in Dr. Chapman, it may be assumed that the services of this surgeon were rendered upon the special request of the railroad company. As to the services of the other two, the entire dependence seems to be upon the fact alleged generally, that they, as well as Dr. Chapman, were its authorized agents, physicians, and surgeons. At the time they assumed the control of Mr. Howard's case, the most that can be said is, that they were required so to do by their employer, the plaintiff in error. It was alleged in the petition that these physicians and surgeons professed to possess, and in fact did possess, a high

degree of skill, ability, and knowledge of medicine and surgery. In *Hewitt v. Eisenbart*, 36 Neb., 794, a malpractice case, the following rule was recognized: "The law requires of a surgeon, in the treatment of his patient, the exercise of that degree of knowledge and skill ordinarily possessed by the members of the medical profession." In the case at bar there was no attempt to prove what particular degree of knowledge and skill was possessed by the surgeons who performed the amputation of which complaint is now made. It was by plaintiff alleged, and therefore, as against his present contentions it must be accepted as true, that they possessed a high degree of skill, ability, and knowledge. When the railroad company required services to be performed for the defendant in error by these surgeons, it is not under the circumstances of this case liable for more than a judicious selection, and this it made without question. It would be absurd to insist that not only this selection should be prudent, but, that the company should guaranty that the surgeons selected would make no mistake and be guilty of no negligence. The very fact that there was required of the surgeons in the line of their duties the possession of a superior degree of skill and of knowledge of medicine, precludes the possibility that the officers or employes of the railroad company should have exercised a supervisory control and direction of the time when, and the mode in which, the necessary surgical operation should be performed. It was required only that the surgeons selected should possess that degree of knowledge and skill ordinarily possessed by members of the same profession. A fair construction of the language of plaintiff's petition more than met this requirement, and the plaintiff in error was not responsible for the manner in which such knowledge and skill were employed, in the absence on its part of any express limitations or directions to their surgeons, and of the possession of such knowledge as would lead a reasonable, careful person to suspect that there would probably be negligence or malpractice.

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7. From a full consideration of all the facts we are satisfied that the defendant in error was not entitled to a verdict, and that upon the request made the court should have so instructed the jury. The questions considered arose naturally in order before the alleged release of the railroad company executed in consideration of the payment to defendant in error of certain sums by the Burlington Relief Association, of which he was a member. The conclusion that plaintiff was not entitled to recover upon the facts pleaded and proved has relieved us of the necessity of considering the effect of the release alleged and established. The judgment of the district court is

REVERSED.

BALDWIN INVESTMENT COMPANY, APPELLEE, v. J. A.
BAILEY ET AL., APPELLANTS.

FILED JUNE 21, 1895. No. 6249.

1. **Mortgages: WAIVER OF RIGHT OF FORECLOSURE: CONSIDERATION.** Where the defendant pleaded the waiver of the stipulated right of a mortgagee, upon failure to pay interest as it fell due, to foreclose for the entire amount secured, *held*, that such waiver was not binding, because the sole consideration to support it was the making of payment of another sum of interest past due, than the sum of interest not paid when due, which gave the right of foreclosure insisted upon.
2. **Conflicting Evidence: REVIEW.** A finding of fact made upon conflicting evidence will not be disturbed on appeal to the supreme court.

APPEAL from the district court of Lancaster county.
Heard below before HALL, J.

Webster, Rose & Fisher *dick*, for appellants.

F. A. Boehmer, N. Rummons, Harwood, Ames & Pettis,

J. P. Maule, Lamb, Ricketts & Wilson, and A. J. Cornish, contra.

RYAN, C.

The dispute to be settled by this appeal is between the Baldwin Investment Company, the appellee, and James A. and Hester A. Bailey, the appellants. There was a decree of foreclosure in the district court of Lancaster county in favor of the appellee, the mortgagee, against the appellants, the mortgagors.

There were three notes each of \$1,400, and each secured by a mortgage which described a lot different from that included in either of the other mortgages. There was in each note the following condition: "If any part of the interest shall remain unpaid thirty days after due, the principal note shall become due and payable at once, or at any time while said default continues, at the option of the holder without notice." By the terms of the mortgage it was agreed that "upon the failure of said mortgagors to make any of the payments secured by this mortgage promptly when due * * * the legal holder thereof may declare the full amount of said principal debt due and payable forthwith, without notice, and cause the mortgage to be foreclosed at any time while such default continues," etc. Default was made in the payment of the interest due October 1, 1890, April 1, 1891, and October 1, 1891. As against the right of the mortgagee to avail itself of the above condition by a foreclosure of the entire debt secured, the appellants, by answer, pleaded that on July 15, 1891, the mortgagee waived the right to foreclose for non-payment of interest which had fallen due on April 1 preceding, in consideration of the payment of the interest which had fallen October 1, 1890, with the interest which was due on said interest up to July 1, 1891. This was treated as denied by reply, and the evidence in reference to the existence of a waiver was conflicting. Under these circum-

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stances it must be accepted as established that the defense was not sustained by proofs. At any rate there was no sufficient consideration to sustain the contract of waiver pleaded, for the payment was only such as the mortgagors were under obligation to make at the time they made it.

In argument there is discussed the effect of exacting usury in the original transactions, but as this defense was not pleaded it cannot be considered. The judgment of the district court is

AFFIRMED.

W. S. MCAULEY ET AL. V. J. H. COOLEY.

FILED JUNE 21, 1895. No. 5305.

Partnership: DISSOLUTION: ACTION AT LAW BETWEEN PARTNERS. Where a partnership business has been fully settled upon an agreed basis furnished by the books kept by one partner, and all its assets by agreement have been turned over to the other partner, and afterward it transpires that by reason of the failure of the partner who kept the aforesaid books to enter therein items showing his own receipt of money of the firm his partner has suffered damage to the extent of such items, an action at law may be maintained for such damage against the partner who caused such injury, and against such sureties as have agreed to be responsible for damages of the character described.

ERROR from the district court of Adams county. Tried below before GASLIN, J.

John M. Ragan, J. B. Cessna, and Capps & Stevens, for plaintiffs in error.

Dilworth, Smith & Shockey, contra.

RYAN, C.

On the 12th day of October, 1888, J. H. Cooley and George A. Bentley entered into a written agreement whereby

they associated themselves as partners under the firm name of J. H. Cooley & Co., for the purpose of dealing in lumber. By the terms of this agreement George A. Bentley's obligations were as follows: "The said George A. Bentley shall and he is hereby firmly bound to give all of his time and use his best efforts to promote the interest of their business. The said George A. Bentley is to keep the books of the firm in a careful and workmanlike manner and to render a just, true, and accurate account of all goods, wares, commodities, merchandise, moneys, and accounts at any time required, and to do all the work required to be done in the business as long as one man can do it, after which the expense of hiring a man shall be done equally out of the business. And George A. Bentley to be allowed to draw his personal expense a sum not to exceed forty dollars (\$40) for each month, which amount shall be charged to his personal account and come out of his share of the profits." The plaintiffs in error, by their written undertaking in relation to the above contract, bound themselves as follows: "Whereas, on the 12th day of October, 1888, the above bounden George A. Bentley and the said J. H. Cooley entered into a copartnership for the purpose of carrying on the business of lumber and coal, etc., in the village of Holstein, in the county of Adams, and state of Nebraska: therefore, the condition of this obligation is such that if the above bounden George A. Bentley shall do and perform all the acts and requirements of the written contract entered into by and between the said parties of the above date, and shall carry out the obligations therein required of him strictly to its spirit and terms, then this obligation to be void, otherwise to remain in full force and effect." The firm of J. H. Cooley & Co. was dissolved about July 31, 1889. On the date last named it is clear from the evidence that the lumber owned by the firm was measured and an invoice made. There was a settlement made between the individual members of the firm at or

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about that time, and the entries in the firm books by Bentley being assumed to be correct, were acted upon by both parties as a reliable basis for a full settlement of the partnership matters. Not only was a settlement made at this time, but pursuant thereto all the assets of the partnership firm were turned over and transferred to J. H. Cooley. Upon the basis assumed, it was agreed between the partners that there was due from Bentley to Cooley the sum of \$13. This action at law was brought for the most part to recover upon the bond signed by the plaintiffs in error the several amounts which Bentley had been paid and had failed to make a record of in the books of the copartnership in any way. The allegations of the petition were very general, but were based upon the theory that for whatever sums Bentley had received to his own use and made no entry of in the books (which it was his duty accurately to keep), the plaintiffs in error were liable. While the petition was perhaps less definite than it might have been, there was no objection made on that score; nor, indeed, do we understand that even now such objection is urged. The plaintiffs in error insist, however, that no suit at law could be maintained between the partners until a settlement had been had between them. There was just such a settlement and an adjustment of the liability of each upon a false, misleading basis furnished by the partner, for the faithful performance of whose duties in that very respect the plaintiffs in error were liable. This action was not to wind up a partnership, but was for the failure of one partner to perform certain duties as he had contracted with another person to do them. True, these duties pertained to partnership affairs between the contracting parties. The undertaking in this respect was none the less that of Bentley individually, and for faithful performance of such individual undertaking plaintiffs in error were liable. There was sufficient evidence to sustain a finding that the failure of Bentley to account for moneys received by him had resulted in damage to Cooley to the amount found by the court.

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There was a claim made in argument that because the articles of copartnership provided that the partnership investment should not exceed \$3,000, whereas in fact \$5,000 was invested, therefore plaintiffs in error were released from their guaranty. We fail to see why this result should follow, for the gravamen of this action was the failure of Bentley to perform his duties, and his failure in this respect had no relation to the investment in the business of more than was contemplated by the articles of agreement. It is quite likely that the limitation of \$3,000 would have prevented a recovery of more than that amount in case Bentley had misappropriated a sum in excess thereof, but such a liability would be much in excess of that for which Bentley and his sureties were, in fact, found answerable. The mere fact that more had been advanced than the defendant in error was bound to furnish would not discharge the sureties. (*Clagell v. Salmon*, 5 G. & J. [Md.], 314; *Morris Canal Co. v. Van Vorst*, 1 Zab. [N. J.], 100.) The judgment of the district court is

AFFIRMED.

RAGAN, C., having been of counsel in this case, took no part in its consideration or determination.

CHARLES E. WILEY, APPELLANT, V. GERTRUDE M.
WILEY ET AL., APPELLEES.

FILED JUNE 21, 1895. NO. 6168.

Quieting Title: DECREE FOR DEFENDANT: SUFFICIENCY OF EVIDENCE: REVIEW. The evidence in this case examined, and held sufficient to sustain the findings and decree of the district court.

APPEAL from the district court of Cass county. Heard below before CHAPMAN, J.

M. A. Hartigan, for appellant.

A. N. Sullivan, *contra*.

RYAN, C.

The appellant in this case brought an action in the district court of Cass county against his brothers and mother and sisters for a decree which would vest in himself the title to a certain described 160 acres of land. His allegations and testimony were that in 1877 his father, since deceased, placed him in possession of the land and agreed to convey it to him; that until the death of his father in April, 1886, and afterward until the commencement of this action, he had continuously retained the possession given him by his father, and as expectant owner had made valuable and permanent improvements. In respect to some of these facts his witnesses corroborated his testimony,—the continuity of his possession, however, they rendered doubtful. It was not disputed that the appellant's father left a will which was duly probated without objection on the part of the appellant. This will bore date August 23, 1878, and was probated on the 18th of February, 1887. By its terms there was devised to appellant the tract involved in this litigation. This, however, was subject to the use and full control of said land by appellant's mother during her life. The testimony which was at all corroborative of that of the appellant was that his father had frequently said that he designed this land for appellant and accordingly had placed him in possession of it, but that he did not intend that appellant should be vested with the ownership while his parents were living. It is more than doubtful whether this last statement of the ancestor was corroborative of the claim of the appellant, for it was as consistent with the provisions of the will as with appellant's theory, and perhaps more so. The testimony of appellant's mother

was that her husband placed appellant in possession of the land in controversy and gave him the use of it, and that during the lifetime of her husband he frequently spoke of his son's bad management and said he ought to have a guardian; that on this account the title was withheld, and to be withheld, until the death of both appellant's father and mother; that her husband while he lived paid the taxes on said land, and after his death she had paid them, and in corroboration of these facts the tax receipts (except one which she testified had been loaned appellant) were introduced in evidence. These receipts on their face showed payment to have been made by appellant's father and mother. Mrs. Wiley further testified that no claim had ever been made by appellant that he was the owner of the property, until, tired by his refusal to pay rents which were necessary for her subsistence, she gave him a notice for the purpose of terminating his possession. She also testified that in 1883 the appellant with his family left the aforesaid land and went to Denver with no intention of returning, and remained absent from March till August, when he returned. This witness also testified that there was never a year, after the appellant was placed upon the 160 acres which he now claims, that his father, until his death, did not crop a part of it. There is involved in this action solely the right of the appellant to deprive his mother, during her lifetime, of the rent, upon which she is largely dependent for her means of support. The district court very justly, and, upon consideration of all the evidence, very correctly, found adversely to appellant. Its judgment is accordingly, therefore,

AFFIRMED.

HATTIE BLAZER V. JOHN J. ROGNER.

FILED JUNE 21, 1895. No. 5049.

1. **Mechanics' Liens:** SUFFICIENCY OF EVIDENCE TO SHOW CONTRACT. Where the testimony is uncontradicted, it is sufficient to show that the owner of the real property to be improved contracted with the claimants of a mechanic's lien for the work subsequently done, through a person in the employ of such claimants.
2. **Trial:** ADMISSION OF INCOMPETENT EVIDENCE: REVIEW. The admission of evidence which, though not competent, is immaterial affords no grounds for the reversal of a decree in equity.

ERROR from the district court of Douglas county. Tried below before WAKELEY, J.

John P. Davis, for plaintiff in error.

B. G. Burbank, contra.

RYAN, C.

J. M. Stephens and Peter Rogner began this action for the foreclosure of a mechanic's lien against real property owned by the plaintiff in error. Afterward John J. Rogner was substituted as plaintiff and, upon a trial had in the district court of Douglas county, a decree was rendered as prayed. Hattie Blazer now prosecutes these proceedings in error for the reversal of this judgment.

The errors assigned are argued in the order in which they shall now be considered. It is insisted that there is not a word of evidence showing a contract between J. M. Stephens and Peter Rogner on one side and Hattie Blazer on the other. There was no oral testimony in the case save that of John J. Rogner, under whose charge the work for which this lien is sought to be enforced was done. He described how he made the contract, its terms, and what he

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did under it. He testified he was working for J. M. Stephens and Peter Rogner. Under the circumstances this was sufficient. It is urged that there was incompetent testimony admitted as to the contents of a certain letter. At most, this was immaterial evidence, for it was simply to the effect that the witness John Rogner, after he had procured the claim for the mechanic's lien to be recorded, sent it to Peter Rogner, who wrote witness a letter in which he said that it was all right. There was no objection made until after the answer objected to had been made. It was then too late to be availing. At any rate this was an equitable action, and the admission of merely immaterial evidence affords no grounds for the reversal of the decree entered. The judgment was sustained by sufficient evidence and is

AFFIRMED.

EDGAR P. DAVIS ET AL. V. NATIONAL BANK OF
COMMERCE.

FILED JUNE 21, 1895. No. 5624.

Election of Remedies: FRAUDULENT CONVEYANCES: AGREEMENT TO PAY GRANTOR'S DEBTS: ATTACHMENT. Where one has received a conveyance of certain property in consideration of which he absolutely agreed to pay the debts of the grantor, it is no defense to the suit brought by the holder of such debt to allege that such holder has previously brought suit against the party originally owing the same, aided by an attachment which has been levied upon the property conveyed as still that of the aforesaid grantor.

ERROR from the district court of Douglas county. Tried below before IRVINE, J.

R. S. Ervin, for plaintiffs in error, cited: *Wilson v. Wilson*, 30 O. St., 365; *Milroy v. Spur Mountain Iron Min-*

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ing Co., 43 Mich., 231; *Buchanan v. Dorsey*, 11 Neb., 373; *Trimble v. Strother*, 25 O. St., 378; *Judson v. Gray*, 17 How. Pr. [N. Y.], 289; *Auburn City Bank v. Leonard*, 40 Barb. [N. Y.], 119; *Brewer v. Maurer*, 38 O. St., 543; *Wood v. Moriarty*, 14 Atl. Rep. [R. I.], 855; *Romain v. Judson*, 26 N. E. Rep. [Ind.], 563; *Parmalee v. Wiggenghorn*, 6 Neb., 322.

A. C. Troup, contra.

RYAN, C.

On the 8th day of February, 1888, plaintiffs in error entered into a written agreement with the firm of Kaufman Bros., by the terms of which the said plaintiffs in error agreed to pay certain debts of Kaufman Bros. The consideration upon which the agreement was based was the transfer of all the property of said firm and its members, subject to certain exemptions of homestead rights enumerated, to the plaintiffs in error. The defendant in error holds certain notes which the plaintiffs in error by the terms of the above agreement were bound to pay. For the purpose of this case it may be assumed that the defendant in error is subject to the same rules as would have been its predecessor in right as to the above notes, which predecessor was the Bank of Commerce. When the above transfer was made by Kaufman Bros. the Bank of Commerce held the notes herein sued upon by the defendant in error. This bank at once began proceedings for the collection of said notes against the firm of Kaufman Bros., the maker thereof, aided by an attachment which was levied upon the goods transferred to plaintiffs in error. In this attachment case the alleged *mala fides* in the above transfer was the particular fraudulent intent, because of which the aid of an attachment was invoked. The cases of *Kaufman v. Coburn*, 30 Neb., 672, and *Kaufman v. United States National Bank*, 31 Neb., 661, were out-

growths of litigation over the same questions as were raised in the above attachment suit. In one of these cases the Bank of Commerce was involved, and it was determined that the transfer assailed as such was not fraudulent as against Kaufman Bros. The sole question now presented is whether or not the attachment proceeding was such an election of remedies and raised such an estoppel that the defendant in error cannot now avail itself of the undertaking of the plaintiffs in error to pay the debt due to it. The commencement of the suit by the defendant in error against Kaufman Bros. for the collection of this debt was not inconsistent with the claim against the plaintiffs in error created by an agreement to which the defendant in error was not a party. In aid of this suit the defendant in error was entitled to avail itself of the remedy of attachment in a proper case. If the fraud alleged should be sustained, the attached property would be subjected to the debt of the attachment plaintiff. If not sustained, there might nevertheless be a judgment against Kaufman Bros., and this, as we understand it, was the course taken in said attachment case. In any event, this was not a choice of remedies against the plaintiff in error. The debt due the Bank of Commerce was one which the plaintiffs in error absolutely undertook to pay. With reference to that indebtedness the beneficiaries were entitled to hold the plaintiffs in error to the same liability as they could have held the original makers of such notes. As was said in *Kaufman v. United States Nat. Bank, supra*, this was not a case of trust where the plaintiffs in error agreed to sell the property and pay the debts, but one in which they agreed, on consideration of receiving the property, that they would pay the debts specified. It was immaterial, therefore, what course was taken with reference to the property conveyed to the plaintiffs in error, for this was not a case wherein an interest in a trust fund created for the benefit of the defendant was repudiated. The plaintiffs in error, upon a sufficient valu-

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able consideration, absolutely agreed to pay this debt, and nothing short of a satisfaction of it in some manner will meet this undertaking. It is deemed sufficient, so far as the alleged estoppel is concerned, to say that the plaintiffs in error were not parties to the suit wherein the conduct of the defendant in error is claimed to have created an estoppel, neither had they any privity with the parties with respect to the subject-matter thereof. The judgment of the district court was right and is

AFFIRMED.

IRVINE, C., took no part in the determination of this case.

B'NAI ISRAEL V. JOSEPH GARNEAU, SR.

FILED JUNE 21, 1895. No. 5228.

Review: CONFLICTING EVIDENCE. In this case there is presented solely a question of fact determined by a jury upon the consideration of conflicting evidence. The judgment upon the verdict will not be disturbed under such circumstances.

ERROR from the district court of Douglas county. Tried below before DOANE, J.

Ambrose & Duffie, for plaintiff in error.

J. W. West and Charles Ogden, contra.

RYAN, C.

The defendant in error sued the plaintiff in error in the county court of Douglas county for rent alleged to be due at the rate of \$50 per month. Upon appeal from the judgment of the county court there was a verdict and judgment for \$66.65, which was upon the basis of \$50 per month.

In the fall of 1888 a parol lease was made between the parties to this suit, for the use of the building leased for church purposes. The rate per month was \$35. The lessee insists that there was a contract of lease for the term of one year. The lessor contends that there was no fixed term other than from month to month. The plaintiff in error paid at the rate of \$35 per month up to June 1, 1889. The evidence adduced by the defendant in error was to the effect that in the early part of May of the year just named plaintiff in error by its agent paid the rent for that month; that this agent was then informed by the agent of the defendant in error that the monthly rental for June and thenceforward would be \$50; that the plaintiff in error could not have the property at a less rate, and that, upon this proposition being submitted to the assembled members of the plaintiff in error, it was assented to, and that the use of the building afterwards was by virtue of the new agreement as to monthly rentals. The theory in support of which the plaintiff in error introduced its evidence was that the original lease was for the term of one year from October 1, 1888, at the rate of \$35 a month, payable monthly; that the change to \$50 a month was but an arbitrary attempt on the part of Garneau to exact the additional \$15 per month, and that this was never assented to by the plaintiff in error. On this theory there is argued the necessity of notice to terminate the original tenancy, and other kindred propositions. By the instructions of the court the law applicable to the theory of each party was fairly stated, and the verdict settled the contested question of fact, approved as it was by the ruling made upon the motion for a new trial. The judgment of the district court is

AFFIRMED.

A. B. SLATER ET AL. V. JAMES SKIRVING ET AL.

FILED JUNE 21, 1895. No. 5970.

1. **Judgments: PROCEDURE TO VACATE: LACHES.** After the close of the term in which a judgment was rendered against him, a judgment defendant filed a petition in equity to vacate the same on the ground that it was irregularly obtained. The irregularity complained of was that the clerk of the court omitted to journalize the judgment immediately upon its rendition. It appears from the evidence that the failure of the judgment defendant to file a motion to set aside the judgment rendered against him during the term at which it was rendered was not caused by the failure of the clerk to journalize the judgment when rendered, but resulted from the laches of the judgment defendant's counsel. *Held.* That he could not be permitted to deny the correctness of the judgment or to renew the controversy.
2. **Judgment Entry.** Whether the neglect or failure of the clerk of a district court to journalize a judgment immediately upon its rendition is an irregularity within the meaning of subdivision 3 of section 602 of the Code of Civil Procedure, not decided.

ERROR from the district court of Holt county. Tried below before KINKAID, J.

H. C. Brome and *H. M. Uttley*, for plaintiffs in error.

M. F. Harrington, *contra*.

RAGAN, C.

On the 4th day of November, 1891, James Skirving brought a suit at law in the district court of Holt county against the copartnership of Slater, Savage & Kelly and one D. Kemp. A summons was issued and duly served on Kemp in Holt county, and within the time fixed by said summons Kemp appeared and filed his answer. A summons was also issued for Slater, Savage & Kelly, directed to the sheriff of Douglas county for service, and

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was duly returned served on them. The February, 1892, term of said district court convened early in that month and adjourned without day on the 22d of the following September. On the 18th of February, 1892, the attorney of Slater, Savage & Kelly procured the summons served on them in Douglas county to be quashed on account of some informality therein, and on the same day Skirving's counsel, by leave of court, so amended his petition as to make Slater, Savage & Kelly, individually, parties defendant to the suit. On the 29th of February a summons was issued for said parties directed to the sheriff of Douglas county and duly served on them on the 1st and 2d days of March. The answer days for these parties as fixed by the summons was April 4. Slater, Savage & Kelly forwarded the copy of the summons served on them to their attorney at O'Neill with instructions to look after their interests. The attorney received this summons on the 10th of March. He did not appear in the case in any manner, nor file any pleadings therein, and on the 31st day of May, 1892, the court entered the default of Slater, Savage & Kelly, heard the evidence, and rendered a judgment against them for the amount prayed for by Skirving in his petition. At this same term of court, but prior to that time, the case had been continued as to the defendant Kemp. After the adjournment of this February term Slater, Savage & Kelly filed a motion to vacate the judgment, which was by the court overruled, and on the 8th of October, 1892, Slater, Savage & Kelly filed a petition in equity in said court against said Skirving to vacate said judgment. The court, after hearing the evidence, entered a decree dismissing the petition. Slater, Savage & Kelly bring this ruling of the court here for review.

We shall assume for the purposes of this case that the answer tendered by Slater and others to the court at the time they filed their petition in equity to vacate the judgment, stated a meritorious defense to the suit of Skirving.

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and that the proofs offered by Slater and others supported the allegations of said answer, and confine ourselves solely to the question as to whether the district court erred in holding that Slater and others had failed to show any equitable or legal reasons why said judgment should be vacated, aside from the fact that they had a meritorious defense to the action in which the judgment was rendered.

In their petition in equity to vacate the judgment Slater and others alleged the following grounds therefor:

1. That the judgment was irregularly obtained. This is one of the grounds provided by the third subdivision of section 602 of the Code of Civil Procedure, authorizing district courts to vacate their judgments after the term at which they were rendered. The evidence in the record does not sustain this averment of the petition. The judgment sought to be vacated was rendered in open court on one of the days of the regular February, 1892, term thereof; but it is argued that the clerk of the court omitted to journalize this judgment at the time it was rendered, or within a reasonable time thereafter, and that Slater and others were thereby prevented from filing a motion to set aside such judgment and default during the February term. It appears from the evidence in the record that the judgment was not journalized on the day it was rendered, nor for considerable time afterwards, but the evidence does not show that Slater and others were prevented by that fact from filing their motion to set aside such judgment and default during the February term. The attorney of Slater and others had already appeared in this case as early as the 18th of February. He had received the summons on the 10th of March, which showed on its face that his clients were required to answer the petition of Skirving by the 4th of April. He made no appearance whatever in the case before the judgment was rendered. He had no consultation, conversation, or agreement with counsel for Skirving for a continuance of the case over the term. He was present in court during

a part of the February term, and just prior to the time the judgment was rendered he absented himself from the court and the county without making any arrangement with the court or opposing counsel as to any disposition of this case, or leaving it in charge of any other counsel. He says, however, that on two different days between the 20th of May and the 30th of June he went to the court house and examined the judgment record, journal entries, and general index, and at these times there was nothing upon any of those records showing that his clients had been defaulted and judgment rendered against them. If counsel had looked at the trial docket he would have seen the minutes made by the trial judge on the 31st of May, 1892, and this would have advised him at the time he visited the court house that his clients had been defaulted and judgment rendered against them, and he would have had ample time from the 1st day of June to the 22d of September, when the court adjourned without day, to have filed his motion to set aside said default and judgment. It appears, then, that the failure of Slater and others to file their motion to set aside the judgment rendered against them during the term at which it was rendered was not caused by the failure of the clerk of the district court to journalize the judgment when rendered, but resulted from the laches of their counsel, and they cannot now be permitted to deny the correctness of the judgment rendered or to renew the controversy.

2. Another reason alleged in the petition for setting the judgment aside is that the petition of Skirving does not state facts sufficient to constitute a cause of action against Slater and others. It would subserve no useful purpose to quote this petition or any part of it. It must suffice to say that in our opinion the petition stated a good cause of action.

3. A third reason assigned in the petition for setting aside the judgment is that Kemp was made a party defendant with Slater and others to Skirving's action for the sole

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purpose of procuring service upon Slater and others and compelling them to come to Holt county for the trial of the case, and with no intention on the part of Skirving to prosecute his action to a judgment against Kemp. If these facts were made to appear, we have no doubt that they would themselves be sufficient to authorize a court of equity to set aside this judgment, as they would amount to a fraud upon Slater and others and the court; but no such facts appear, and in the answer tendered by Slater and others to the court at the time of the filing of this petition no such defense is interposed. The decree of the district court is

AFFIRMED.

BEN M. SIGLER V. SARAH McCONNELL.

FILED JUNE 21, 1895. NO. 6405.

1. **Admission of Evidence: ASSIGNMENTS OF ERROR.** An assignment of error here that the district court erred in admitting the evidence of a named witness will be overruled if any of the evidence of said witness was properly received.
2. **Instructions: ASSIGNMENTS OF ERROR.** An assignment of error that the district court erred in giving or refusing certain instructions will be overruled where it appears from the record that no exception was taken to the action of the court in giving or refusing the instructions complained of.
3. **Order Overruling Motion for New Trial: ASSIGNMENTS OF ERROR.** An assignment of error in a petition in error that the court erred in overruling the motion for a new trial, such motion containing seven separate and distinct grounds, is too general, since it does not point out or suggest wherein the verdict and judgment were erroneous. *Glaze v. Parcel*, 40 Neb., 732, followed.

ERROR from the district court of Lincoln county. Tried below before NEVILLE, J.

T. Fulton Gantt and Joseph G. Beeler, for plaintiff in error.

Grimes & Wilcox, contra.

RAGAN, C.

Sections 108 and 109, chapter 78, Compiled Statutes, 1893, provide:

"Section 108. That from and after the passage of this act it shall be unlawful for any person to build a barbed wire fence across or in any plain traveled road or track in common use, either public or private, in this state, without first putting up sufficient guards to prevent either man or beast from running into said fence.

"Sec. 109. Any person violating the provisions of the foregoing section shall be guilty of a misdemeanor and fined not less than five dollars nor more than twenty-five dollars, and shall be liable for all damages that may accrue to the party damaged by reason of said barbed wire fence."

Ben M. Sigler sued Sarah McConnell in the district court of Lincoln county, and alleged in his petition that on the 19th of June, 1892, McConnell had built a barbed wire fence on the north line of her land across and in a plain traveled road in common use without putting up any guards "whatsoever as required by law;" that on the night of said 19th of June, Sigler was driving a span of horses attached to a buggy upon said "plain traveled road" and one of said horses became entangled in said barbed wire fence and was injured, for which injury he prayed damages. The answer of McConnell admitted the building of the fence; pleaded that the injury to Sigler's horse was the result of his own negligence, and denied all the other allegations in the petition. There was a trial to a jury, with a verdict and judgment in favor of McConnell, and Sigler prosecutes to this court a petition in error.

1. The first assignment of error is that "the court erred

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in admitting the evidence of the witness John McConnell." Under any view of the case some of the evidence given by this witness was competent and proper; and again, it appears from an examination of the bill of exceptions that no objection was made by Sigler on the trial to any of the evidence of this witness. The assignment must therefore be overruled.

2. The second assignment is that the court erred in giving the second, third, fourth, fifth, and sixth paragraphs of the instructions given by the court on its own motion. Some of these instructions were properly given, and as the assignment is that the court erred in giving all of them, we cannot consider it any further than to ascertain whether any one of the instructions objected to was properly given. Again, it appears from the transcript that Sigler took no exception to the giving of either of the instructions complained of at the time they were given. The assignment, then, must fail.

3. The third assignment is that the court erred in giving the fifth and sixth paragraphs of the instructions asked by McConnell. What has been said under the second assignment of error is applicable to this; and for the same reason the assignment must be overruled.

4. The remaining assignment is that the court erred in overruling the motion for a new trial. In *Glaze v. Parcel*, 40 Neb., 732, it was held: "An assignment of error in a petition in error, that 'the court erred in overruling the motion for a new trial,' such motion containing five separate and distinct grounds, is too general, since it does not point out or suggest wherein the verdict and judgment were erroneous." In the case at bar the motion contained seven distinct grounds; and it further appears from the record that Sigler took no exception to the order of the court overruling his motion for a new trial.

The petition in error presents nothing for review. The judgment of the district court is

AFFIRMED.

KEARNEY LAND & INVESTMENT COMPANY, APPELLEE,
V. C. I. ASPINWALL ET AL., APPELLANTS.

FILED JUNE 21, 1895. No. 6386.

1. **Executions: APPRAISAL: OBJECTIONS.** Parties desiring to make objections to the value fixed on property appraised for sale under execution, whether on the ground that such valuation is too high or too low, should make and file such objections in the court where the case is pending, together with a motion to set aside such appraisement, before the sale occurs.
2. ———: ———: **ATTACK.** Appraisers of property for sale under execution act judicially, and on motion made after such sale to vacate the same, the value fixed by them on the property appraised can only be assailed for fraud.
3. ———: ———: **SALES.** To justify the setting aside of a sale on the ground that the property was appraised too low the actual value of the property must so greatly exceed its appraised value as of itself to raise a presumption of fraud in the making of the appraisement. *Vought v. Foxworthy*, 38 Neb., 790, followed.
4. ———: ———: **MORTGAGES: DUTY OF OFFICER.** It is the duty of an officer holding an execution for the sale of real estate to cause said real estate to be appraised and forthwith—immediately—deposit a copy of the appraisement made with the clerk of the court issuing the order of sale, in order that parties interested in the property may know what value has been placed thereon by the appraisers, and if they think such appraisement too high or too low, that they may have an opportunity to file objections to the appraisement on that ground before the sale occurs.
5. ———: ———: ———: **OBJECTIONS.** After such sale is made it is too late for the parties for the first time to question the correctness of the appraisement made on any other ground than that of fraud.

APPEAL from the district court of Buffalo county.
Heard below before HOLCOMB, J.

Willis L. Hand, for appellants.

Calkins & Pratt, contra.

RAGAN, C.

This is an appeal from the district court of Buffalo county confirming a sale of real estate made in pursuance of a decree of foreclosure of a mortgage thereon. The order of sale was issued on the 9th day of September, 1892. On the 21st of September, 1892, the sheriff caused the property to be appraised. On the 2d day of November, 1892, the sale was made. On the 22d of December, 1892, the appellants, defendants to the mortgage foreclosure suit in the court below, filed objections to the confirmation of the sale, the grounds of said objections being that the appraisement of the property was unjust and too low. The property consisted of twelve lots in additions to the city of Kearney, Nebraska, and the interest of the appellants in said property was appraised at \$2,348.70. At the sheriff sale the property was sold to the appellee for \$1,600. When the case came on for hearing on the motion to confirm the sale and the objection of the appellants thereto, the appellee voluntarily raised its bid \$748, and thereupon the court overruled the objection of the appellants to the confirmation of the sale and confirmed the same. We cannot disturb this decree. The appellee was entitled to a confirmation of the sale on its first bid of \$1,600. Appraisers of property sold on execution or in pursuance of a decree in equity act judicially. This property was appraised and, we presume, the appraisement forthwith returned and deposited with the clerk of the court who issued the order of sale on the 21st of September, 1892. The appellants then knew on that date what the appraisement made was. If they thought that it was too high or too low they should at once have filed objections to the appraisement for that reason, and such objection would have arrested the sale until after such objections were disposed of by the court, or the plaintiff in the decree would have made the sale at his peril. The appellants, however, did

not do this, but waited until after the sale was made on the 2d of November, and for more than one month after that time before they filed any objection to the appraisement made. After the sale was made it was too late for the appellants, for the first time, to question the correctness of the appraisement made of the property on any other grounds than that of fraud. In *Vought v. Foxworthy*, 38 Neb., 790, it was held: "Parties desiring to make objections to the value fixed on property appraised for sale under execution, whether on the ground that such valuation is too high or too low, should make and file such objections in the court where the case is pending, together with a motion to set aside such appraisement, before the sale occurs. The party seeking the sale of the appraised property would thus have notice of the objections to its appraised value, and he could either proceed to sale and take his chances of the appraisement being finally set aside, or could stay the sale until such time as the court should decide the question as to the correctness of the appraisal made." Appraisers of property for sale under execution act judicially, and on motion made after such sale to vacate the same the value fixed by them on the property appraised can only be assailed for fraud. Objection that the appraised value of the property is too high or too low should be made and filed in the case with a motion to vacate the appraisement before a sale occurs thereunder. (*Smith v. Foxworthy*, 39 Neb., 214.) The decree of the district court is

AFFIRMED.

S. H. GRAVES ET AL. V. W. V. MORSE & COMPANY.

FILED JUNE 21, 1895. No. 6410.

Sales: MERCHANDISE: TIME TO DELIVER: ACCEPTANCE: EVIDENCE: REPLEVIN. A merchant ordered some rubber goods from a wholesale house, but the goods were not shipped when ordered. The merchant was called away from home, and before leaving instructed his clerk, whom he left in charge of his business, not to receive the rubber goods if they should come as they had not been shipped in a reasonable time after they were ordered. While the merchant was absent the rubber goods arrived, and the clerk paid the freight on them and stored them not unpacked in a warehouse belonging to the merchant. A day or two after the merchant returned home he sold his entire stock of merchandise, without an inventory thereof, and delivered possession of it to one G. At the time of this sale the merchant was not aware that the rubber goods had arrived. The wholesale merchant brought replevin for the rubber goods against the merchant's vendee. The jury found a verdict in favor of the wholesale merchant. *Held*, (1) That the evidence sustained the finding; (2) that the sole question was whether the rubber goods had been accepted by the merchant, and the title to said goods vested in him prior to the time he made the sale of his stock of merchandise to G.; (3) that the test was whether, if the wholesale merchant had sued the merchant for the price of the rubber goods, the evidence would sustain a finding in favor of the merchant; (4) that it was the duty of the wholesale merchant to deliver the quality and quantity of goods ordered, and to deliver them within a reasonable time, and the wholesale merchant not having done this the merchant had a right to decline to receive the goods; (5) whether, under all the facts and circumstances in evidence in the case, the merchant did accept the goods and become liable for their payment to the wholesale merchant, was a question for the jury, and properly submitted by the instructions of the court.

ERROR from the district court of Buffalo county. Tried below before HOLCOMB, J.

Dryden & Main, for plaintiffs in error.

Calkins & Pratt, contra.

RAGAN, C.

In this case the finding of the jury enables us to say that the following facts are established: On and prior to the first of November, 1890, H. H. Matteson was engaged in the mercantile business in the town of Shelton, this state. On or about that time he ordered certain rubber goods from W. V. Morse & Co., of Omaha, Nebraska. These goods were not shipped to him when ordered. About the 16th of November Matteson went to the state of Iowa on business, leaving his wife and a clerk named Lilly in charge of the store. Before Matteson left he instructed them if the rubber goods previously ordered from Morse & Co. should arrive not to accept them, as Morse & Co. had delayed their shipment too long. On the 20th or 21st of November, and while Matteson was absent, the rubber goods arrived, and the clerk Lilly, without the knowledge of Mrs. Matteson, paid the freight on them and stored them not unpacked in a warehouse in which Matteson was accustomed to keep flour, provisions, hardware, etc. Matteson returned on the 22d or 23d of November and sold his entire stock of merchandise to S. H. Graves and George Mortimer. The consideration for this sale was a debt of \$2,500, which Matteson owed a bank in Shelton, \$1,500 which he owed J. B. Farwell & Co., and which debt was assumed by Matteson's vendees, and a half section of real estate lying near said town of Shelton. At the time this sale was made possession of the stock of merchandise was given to Graves and Mortimer. At the time of the sale no invoice of the property was made, and Matteson did not know that the rubber goods ordered of Morse & Co. had arrived. In a day or two after said sale Morse & Co. replevied from Graves & Mortimer the rubber goods mentioned above, still remaining in boxes unpacked in said warehouse, Morse & Co. claiming to be the owners of said goods. There was a trial to a jury,

with a verdict and judgment in favor of Morse & Co., and Graves & Mortimer have prosecuted to this court a petition in error.

1. The first assignment of error is that the district court erred in permitting Morse & Co. to prove on the trial the value of the stock of merchandise at the time it was sold by Matteson to Graves & Mortimer. On the trial H. H. Matteson was examined as a witness in behalf of Morse & Co., and was asked by their counsel this question: "What was the value of the stock at the time of the transfer?" To this question counsel for Graves & Mortimer objected, as incompetent, immaterial, and irrelevant. The court overruled the objection and they excepted, and the witness answered: "About \$13,000." We think this evidence was incompetent, immaterial, and irrelevant under the issues, but we do not think that Graves & Mortimer were prejudiced by its admission.

2. The remaining assignment of error is that the court erred in giving to the jury the following instruction: "4. The real question for you to determine is whether or not the witness Matteson had received and accepted the goods in question after they were shipped by the plaintiff. If he did receive and accept the goods, then the title would pass from the plaintiff to Matteson and he could pass a good title to the defendant; but if the witness Matteson did not receive and accept the goods from the plaintiff he has no title to the goods, and none could pass to the defendant, and the plaintiff could maintain replevin therefor. If the witness Lilly received the goods on behalf of the witness Matteson, but without authority from the said Matteson, or against his express directions, then this would not be an acceptance of the goods, and no title would pass unless the said Matteson afterwards ratified or consented to the action in that respect of the witness Lilly. If you find from the evidence that the witness Lilly was authorized by the witness Matteson to receive and accept the goods for him, and

that he did receive and accept the goods in question, and was not directed by Matteson, or his wife acting for him, not to receive the goods, then if he accepted the goods it would be an acceptance by Matteson, and the title thereto passed from plaintiff to Matteson, and would pass to the defendant in the sale of the stock of goods to him, unless expressly reserved by Matteson when he made the sale. If from the evidence you find that the witness Lilly had no authority to receive and accept the goods, or was directed not to do so by Matteson, or his wife acting for him, and the goods were not in fact received by Matteson, then the title never passed from the plaintiff and they are entitled to recover in this action." We do not think the court erred in giving this instruction. The sole question litigated at the trial was whether the rubber goods had been accepted by Matteson and the title of said goods vested in him prior to the time he made the sale of his stock of merchandise to Graves & Mortimer. The case must be looked at as though this was a suit by Morse & Co. against Matteson to recover the purchase price of these rubber goods. It was the duty of Morse & Co. to deliver the quality and quantity of goods ordered and to deliver them within a reasonable time. They not having delivered these goods when ordered, or within a reasonable time thereafter, Matteson had a right to decline to accept them; and whether under all the facts and circumstances in evidence in this case he did accept them so as to become liable for their payment to Morse & Co. was a question for the jury and properly submitted by the instruction complained of. The criticism made by counsel for Graves on the instruction is that by it the court ignored the question of good faith on the part of Graves in purchasing these rubber goods from Matteson. Whether or not Graves & Mortimer knew that these rubber goods were in the warehouse at the time they purchased this stock was a question for the jury; and if we assume that they were aware of the presence of the rubber goods

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there, and supposed they were buying those goods as well as the others, still the evidence of Matteson is that he did not know that those rubber goods had been received at Shelton until they were replevied by Morse & Co.; and the jury by its verdict has found this statement of Matteson to be true. The question of the good faith of Graves & Mortimer in making this purchase was not an issue in this case. If Matteson did not own the rubber goods he could not convey the title thereof to Graves. The whole question was a question of fact, namely, had Matteson accepted these goods at or prior to the time he made the sale to Graves? Had his conduct been such as to amount to an acceptance of the rubber goods on his part and estop him, in a suit against him by Morse & Co. for their price, from asserting the defense of non-delivery or non-acceptance? And this is in effect what the court told the jury by the instruction criticised. There is no error in the record and the judgment of the district court is

AFFIRMED.

NATHAN CAMPBELL V. H. L. MCCLURE.

FILED JUNE 21, 1895. No. 6134.

1. **Covenant Against Incumbrances: ACTION FOR BREACH: JURISDICTION OF JUSTICE OF THE PEACE.** In July, 1882, one Campbell sold and conveyed to one McClure certain real estate by general warranty deed. The deed contained a covenant that the real estate conveyed was free of incumbrances. At the time of the conveyance taxes had been assessed against the real estate for the year, but such taxes were not then due. Campbell neglected to pay these taxes after their maturity and McClure, to prevent the sale of the real estate, paid the taxes and sued Campbell before a justice of the peace to recover the amount so paid. *Held*, (1) That the covenant against incumbrances was a personal obligation, did not run with the land, and was broken at the

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time the conveyance was made (*Chapman v. Kimball*, 7 Neb., 399, followed); (2) that the suit was not an action on a contract for real estate within the meaning of section 907 of the Code of Civil Procedure, nor was the action one in which the title to real estate was sought to be recovered or could be drawn in question; and that a justice of the peace had jurisdiction of the case.

2. **Taxes: LIABILITY OF VENDOR FOR PAYMENT.** A vendor who sells real estate after the first day of April in any year, in the absence of a contract to the contrary, is, under the statute, liable for the taxes on such real estate for that year. (*McClure v. Campbell*, 25 Neb., 57.)

ERROR from the district court of Buffalo county. Tried below before HOLCOMB, J.

Calkins & Pratt, for plaintiff in error, cited: *Jones v. Gardner*, 10 Johns. [N. Y.], 266; *Van Dyke v. Rule*, 31 N. E. Rep. [O.], 882; 3 Washburn, Real Property [5th ed.], 479.

Marston & Nevius, contra, cited: *Brackett v. Evans*, 1 Cush. [Mass.], 79; *Sargent v. Currier*, 6 Am. Rep. [N. H.], 524; *Ticonic Bank v. Smiley*, 27 Me., 225; *Mushrush v. Devereaux*, 20 Neb., 50; *Nesbit v. Campbell*, 5 Neb., 433; *Chapman v. Kimball*, 7 Neb., 399.

RAGAN, C.

This action was brought by H. L. McClure against Nathan Campbell before a justice of the peace in Buffalo county. The case was afterwards tried on appeal in the district court of said county, where McClure had a verdict and judgment, to reverse which Campbell prosecutes to this court a petition in error. The case was before this court once before. (See *McClure v. Campbell*, 25 Neb., 57.)

On the 29th of July, 1882, Campbell sold and conveyed to McClure certain real estate by a general warranty deed. This deed contained a covenant that the real estate conveyed was free and clear of all incumbrances. At that

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time taxes had been assessed against said real estate for said year, amounting to \$51.46. These taxes were not due, however, until the first day of the following October. Campbell neglected and refused to pay these taxes after their maturity, and McClure was compelled to advance and pay the same to prevent the real estate from being sold. The object of this action was to recover back the taxes paid. The only question made by the district court, and the only one argued here, is that the justice of the peace before whom the action was originally brought had no jurisdiction of the case, because a covenant against incumbrances is a real covenant running with the land, and, therefore, necessarily draws in question the title to real estate. Section 44, chapter 77, Compiled Statutes, 1893, provides: "The owner of property on the first day of April in any year, shall be liable for the taxes of that year." "A vendor who sells real estate after the first day of April of any year, in the absence of a contract to the contrary, is, under the statute, liable for the taxes on such real estate for that year." (*McClure v. Campbell*, 25 Neb., 57.) Section 18 of article 6 of the constitution provides that justices of the peace shall "have and exercise such jurisdiction as may be provided by law; *Provided*, That no justice of the peace shall have jurisdiction of any civil case where the amount in controversy shall exceed two hundred dollars; nor in a criminal case where the punishment may exceed three months imprisonment, or a fine of over one hundred dollars; nor in any matter wherein the title or boundaries of land may be in dispute." Section 1103 of the Code of Civil Procedure provides: "Justices of the peace shall have jurisdiction in all cases where the sum in question does not exceed two hundred dollars except in cases limited in this title." The limitations alluded to above are found in section 907 of the Code of Civil Procedure, which provides that justices shall not have jurisdiction: "First—To recover damages for an assault, or

assault and battery. Second—In any action for malicious prosecution. Third—In actions against justices of the peace or other officers for misconduct in office, except in the cases provided for in this title. Fourth—In actions for slander, verbal or written. Fifth—In actions on contracts for real estate. Sixth—In actions in which the title to real estate is sought to be recovered, or may be drawn in question, except actions for trespass on real estate, which are provided for in this title." It will thus be seen that unless this action is one on a contract for real estate, or is an action in which the title to real estate is sought to be recovered, or may be drawn in question, that neither the constitution nor the statute has denied to a justice of the peace jurisdiction of the case. Of course it is not an action on a contract for real estate within the meaning of section 907 of the Code of Civil Procedure.

In *Mushrush v. Devereaux*, 20 Neb., 49, it was held that a justice of the peace had jurisdiction of an action to recover back money paid upon an agreement for the purchase and sale of land where the defendant had refused to perform his agreement to convey. Nor is it an action in which the title to real estate is sought to be recovered, nor are we able to comprehend how the title to this real estate may be drawn in question in this action. The covenant against taxes or incumbrances was broken at the time it was made, as the taxes assessed against this real estate in the year 1882 were a lien thereon from the 1st day of April of that year. (Sec. 138, ch. 77, Compiled Statutes, 1893.)

In *Chapman v. Kimball*, 7 Neb., 399, the court held that where a covenant against incumbrances is broken at the time of the conveyance it does not run with the land. The obligation is merely personal, and is limited to the parties to the covenant, and confers no right of action on subsequent purchasers of the estate. In this case MAXWELL, C. J., speaking for the court, said: "The covenant against incumbrances is in the present tense, 'that said premises are

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free from incumbrance.' If the taxes in question actually existed as a lien against the land in question, at the time of the conveyance, the covenant was broken at that time, and a cause of action at once accrued in favor of the covenantee for his damages." The justice of the peace in this case had jurisdiction of the action. The judgment of the district court is right and is

AFFIRMED.

C. A. MOORE V. G. E. HUBBARD.

FILED JUNE 21, 1895. No. 5967.

Review: CONFLICTING EVIDENCE: AFFIRMANCE OF JUDGMENT: PRACTICE. No question was presented in this case except a question of fact, and several questions of practice which have already been repeatedly passed upon.

ERROR from the district court of Holt county. Tried below before KINKAID, J.

R. R. Dickson and E. W. Adams, for plaintiff in error.

M. F. Harrington, *contra*.

IRVINE, C.

In this case there are eight assignments of error. Of these the sixth is "Errors of law occurring at the trial, and duly excepted to by plaintiff." This, while sufficient in a motion for a new trial, is too general to present any question for review in a petition in error.

The seventh is that the court erred in overruling the motion for a new trial. As the motion for a new trial assigns six grounds, this assignment is too general.

The eighth is that the court erred in not considering newly-discovered evidence and affidavits in support thereof. Accepting this as a sufficient assignment that the court

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erred in refusing a new trial on the ground of newly discovered evidence, we cannot consider it, because the affidavits in support thereof are not preserved by a bill of exceptions.

The remaining assignments call only for a consideration of the sufficiency of the evidence to sustain the verdict in its general character and as to its amount. No question of law is presented on this point. We have examined the evidence and find that while it is conflicting there is sufficient to sustain the verdict.

JUDGMENT AFFIRMED.

WILLIAM F. DENNEY ET AL. V. JEREMIAH DENSLOW.

FILED JUNE 22, 1895. No. 5940.

Affirmance of Judgment in Absence of Brief or Oral Argument.

ERROR from the district court of Douglas county. Tried below before FERGUSON, J.

John L. Webster, for plaintiffs in error.

Cowin & McHugh, contra.

PER CURIAM.

This is a petition in error to reverse a judgment of the district court of Douglas county. The judgment was rendered September 20, 1892. The petition in error was filed in this court January 12, 1893. The cause was submitted October 3, 1893. No briefs have been filed in this court by either of the parties and the judgment is therefore affirmed as of course.

JUDGMENT AFFIRMED.

EDWARD QUINN V. SOLOMON R. MOSS.

FILED JUNE 22, 1895. No. 5972.

1. **Guaranty for Payment of Goods: CHANGE OF CONTRACT BY BUYER AND SELLER: LIABILITY OF GUARANTOR.** In an action on a written guaranty to pay for a quantity of cigars sold to a third person it was *held* that the fact that by the agreement of the seller and purchaser, made after the execution of the guaranty, all the cigars of a particular brand named in the order were not sent, but in lieu thereof were substituted an equal number of the same quality, kind, style, and price, put up under another brand, did not constitute such a change in the contract as to release the guarantor from liability, especially where it was not shown that either of the brands had any special or commercial value, or that the brand upon the boxes containing the cigars affected the sale thereof.
2. **Judgment Against Guarantor: SUFFICIENCY OF EVIDENCE.** *Held*, That the verdict is supported by the evidence.
3. **Parol Evidence: WRITTEN GUARANTY.** Parol contemporaneous evidence is inadmissible to vary or contradict the terms of a written contract.
4. **Assignments of Error.** An assignment of error is insufficient which fails to point out the particular error objected to.

ERROR from the district court of Douglas county. Tried below before DOANE, J.

C. A. Baldwin, for plaintiff in error.

B. N. Robertson, *contra*.

NORVAL, C. J.

This action was brought by Samuel R. Moss against Edward Quinn, upon a written contract of guaranty for the payment of a bill of cigars sold by the plaintiff to one B. C. Foley. A verdict was returned for the plaintiff, and upon it a judgment was rendered. The defendant prosecutes error.

The plaintiff below is a manufacturer of cigars at Lancaster, Pennsylvania. In February, 1890, he sold, through his traveling salesman, one Rosenstine, to one B. C. Foley, on sixty to ninety days' time, the following bill of cigars: 5,000 New Arrival, at \$15; 10,000 Otella, at \$23; 10,000 La Rosa De Key West, at \$23; 5,000 Sweet Buds, at \$15. The following written guaranty was, at the time of the purchase, executed by the defendant and attached to the bill of goods:

"I hereby guaranty the payment of the above bill bought by B. C. Foley, Omaha, Nebraska, of S. R. Moss, Lancaster, Pennsylvania. EDWARD QUINN."

One of the defenses interposed is that after the guaranty was given Foley and Rosenstine changed the contract by the terms of which a new and different selection of cigars was made, and under which the cigars were furnished Foley. The evidence shows that after the signing of the contract it was agreed between Foley and Rosenstine but 5,000 Otella cigars should be sent and in lieu of the other 5,000 of that brand there should be shipped an equal number of Key West Extras; that 5,000 Three for a Quarter were substituted for the same number of the brand La Rosa De Key West. The goods were furnished and delivered in accordance with this arrangement. There was no change in the prices of the cigars or the aggregate amount of the bill. The plaintiff, by several witnesses, introduced evidence tending to establish that the 5,000 Key West Extras furnished were of the same quality, style, and make as the Otella, except the label on the box, and that in quality and in every other particular the 5,000 Three for a Quarter which were sent were the same as the La Rosa De Key West. There is an entire lack of any evidence that the brands under which cigars are put up have any special or commercial value. If they have any such value it is a matter of proof. Certainly it is not a matter of which the court can take judicial knowledge. The only change

made from the original selection, according to the proof submitted by the plaintiff, consisted in the brands or labels placed upon the boxes, and in the absence of any showing that brands affected the sales of the cigars, we cannot say that the original contract was in any material respect altered or changed. There being no substantial change in the agreement, it follows that the guarantor was not released from his liability. (*Fisherdict v. Hutton*, 44 Neb., 122; *Feustmann v. Estate of Gott*, 32 N. W. Rep. [Mich.], 869.)

At this point we may as well dispose of the assignment that the verdict is not sustained by the evidence. It is argued that the cigars delivered to Foley by the plaintiff below were not of the quality promised or equal to the samples from which the selections were made. There is an irreconcilable conflict in the testimony as to whether the cigars sent to Foley were of the kind and quality contracted for. The testimony of the defendant's witnesses is to the effect that the goods were not according to the contract, while the testimony on behalf of the plaintiff tends to show that the cigars delivered were of the style, quality, and kind purchased. It is true that the brands of some of the cigars delivered were different from those described in the original agreement; but, as we have already seen, this variance was immaterial and did not affect the validity of the contract. The jury by their verdict have said that Foley got the goods selected and purchased, and their finding is not without ample evidence to support it.

Another assignment is that the court erred in excluding testimony offered by the defendant below to show that at the time the goods were purchased and the guaranty given, the plaintiff agreed the cigars would be union made and union labeled. This testimony was properly excluded, as its admission would have been a clear violation of an elementary rule of evidence, to the effect, that parol contemporaneous evidence is inadmissible to vary or contradict

the terms of a written contract. The order for the cigars was a written one, signed by Foley; and the guaranty was likewise in writing. The purpose of the offered testimony was to add to or engraft upon the written contract a stipulation qualifying the terms thereof. Under the authorities such evidence was not admissible. (1 Greenleaf, Evidence, sec. 275; *Hamilton v. Thrall*, 7 Neb., 210; *Dodge v. Kiene*, 28 Neb., 216; *Kaserman v. Fries*, 33 Neb., 427; *Nichols v. Orandall*, 43 N. W. Rep. [Mich.], 875; *Brintnall v. Briggs*, 54 N. W. Rep. [Ia.], 531.)

Complaint is made in the brief of certain other rulings of the trial court on the admission and exclusion of testimony, but they will not be reviewed, inasmuch as the rulings are not assigned with sufficient particularity in the petition in error, the assignments being as follows:

"8. The court erred in refusing to permit the defendant to give to the jury certain other material and important evidence on his part, as fully appears in the record of the evidence kept by the official reporter, and which refusals were excepted to at the time by the defendant, as is shown by the record.

"9. The court erred in permitting the plaintiff below to give certain evidence to the jury on his part, against the objection and exception of the defendant, all of which appears in the record of the evidence as kept and reported by the official reporter.

"10. And for other and manifest reasons appearing of record in the case."

These assignments are too general and indefinite to present any question to this court for review. (*Wanzer v. State*, 41 Neb., 238; *Kirkendall v. Davis*, 41 Neb., 285; *Bloedel v. Zimmerman*, 41 Neb., 695; *Wonderlick v. Walker*, 41 Neb., 806; *Wiseman v. Ziegler*, 41 Neb., 886.)

The alleged errors in giving instructions are grouped in one assignment in the petition in error, and in like manner the alleged errors in refusing requests to charge are

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grouped in the petition in error. Upon due consideration of the instructions given we find that one or more is free from criticism and that at least one of the instructions refused was faulty. Under the well settled rule the assignments relating to the instructions will be overruled. The judgment is

AFFIRMED.

JAMES HAROLD ET AL. V. MOLINE, MILBURN & STODDARD COMPANY.

FILED JUNE 22, 1895. NO. 6375.

1. **Review: JOINT ASSIGNMENTS OF ERROR.** A joint assignment of error by several parties which cannot be sustained as to all who joined therein will be held bad as to all.

ERROR from the district court of Douglas county. Tried below before HOPEWELL, J.

George W. Cooper, John W. Cooper, and Stevens, Love & Cochran, for plaintiffs in error.

Switzler & McIntosh and Elmer E. Thomas, contra.

NORVAL, C. J.

The Moline, Milburn & Stoddard Company brought two actions in justice's court against James Harold and J. C. Christensen, each suit being upon a promissory note executed by the defendants. Judgments were rendered against them, and thereupon they prosecuted appeals to the district court, where the suits were consolidated by stipulation of the parties. There was a trial in the court below to a jury, with a verdict in favor of the plaintiff in the sum of \$260.23, upon which judgment was rendered on

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May 26, 1893. Afterwards, on the 5th day of July, 1893, judgment for said amount, on motion of the plaintiff, was likewise rendered by the court against Swan Peterson and Mada D. Peterson, sureties on the appeal undertakings. J. C. Christensen, James Harold, and the Petersons prosecute error, they having filed in this court a joint petition in error. An examination of the several errors therein assigned discloses not one which affects all the plaintiffs in error jointly. The case is therefore controlled by *Gordon v. Little*, 41 Neb., 250, and *Small v. Sandall*, 45 Neb., 306, where it was held that a petition in error is indivisible, and when made jointly by several parties it will be overruled as to all if it cannot be sustained as to all.

JUDGMENT AFFIRMED.

JAMES W. STRATTON V. W. A. NYE ET AL.

FILED JUNE 22, 1895. No. 5691.

1. **Trial: PROCEDURE: REVIEW.** Considerable discretion is vested in the trial judge in controlling and managing the routine proceedings at the trial, and this applies to the opening statements of counsel as well as to other incidents of the trial. The discretion must be a reasonable one, and it is only where there has been a clear abuse of discretion that the error will be corrected by a reviewing court.
2. —: **MISCONDUCT OF ATTORNEY: GROUND OF REVERSAL.** Where the defendant's attorney, in his opening statement to the jury, with the permission of the court, and against the objection of the plaintiff, rehearses matters wholly foreign to the issues in the case, and which are calculated to excite the prejudices of the jury, it will furnish good cause for reversing a verdict and judgment rendered for the defendant.
3. **Hearsay Evidence: REVIEW.** *Held*, That the admission of certain testimony referred to in the opinion was reversible error.

ERROR from the district court of Saunders county.
Tried below before BATES, J.

Good & Good and M. B. Reese, for plaintiff in error.

George I. Wright, contra.

NORVAL, C. J.

This suit was brought by James W. Stratton against W. A. Nye and David Fraser upon a promissory note for \$204, purporting to be signed by them, payable to the order of C. W. Sanford, and by him indorsed to the plaintiff. No service of summons was had upon Nye, nor did he appear to the action. Fraser answered by a general denial, his defense being that the note, as to him, was a forgery. There was a trial to a jury with a verdict and judgment in favor of the answering defendant, to reverse which the plaintiff brings the cause to this court on error.

Error is alleged in that the court permitted, over the objection and exception of the plaintiff, counsel for the defendant in his opening statement to the jury to say that "W. A. Nye in 1889 was the owner of one-half interest in a corn sheller, in connection with Robert Gilchrist; that some time in July of that year he sold that half interest to Mr. Gilchrist, and after this he came to town and mortgaged the same half interest which he had sold to Mr. Gilchrist." The foregoing matters rehearsed to the jury, even if true, were entirely irrelevant to the issues in the case. They could not, if established by evidence, in the least degree tend to show that the name of Fraser attached to the note was not his genuine signature. This is too plain for argument. It is not only the province, but the duty, of the trial court to see to it that counsel in his opening address to the jury confines his remarks to a statement of the nature of the issues to be tried and an outline of the evidence by which the cause of action or defense is to be established.

In such opening statement it is the duty of counsel to refrain from rehearsing irrelevant and prejudicial matters or facts which are foreign to the issues; and where counsel abuses the privilege of advocacy in his opening by rehearsing irrelevant and prejudicial matters, the court should, especially when objection is made, reprove the practice in the hearing of the jury, and as far as possible remedy the mischief by instructing the jury to disregard the prejudicial statements. The trial judge must necessarily have a broad discretion in such matters; but if counsel abuse their privilege, or the trial court its discretion, to the prejudice of a party, it is sufficient ground for a reversal of the case. (1 Thompson, Trials, secs. 264-266; *Scripps v. Reilly*, 35 Mich., 371; *Hennies v. Vogel*, 87 Ill., 242; *Ayrault v. Chamberlain*, 33 Barb. [N. Y.], 229.) In the case at bar, counsel for the defendant in his opening statement repeated before the jury,—and that too with the sanction and approval of the trial judge,—matters entirely foreign to the issues, which had a tendency to excite the prejudices of the jury. We deem this error good and sufficient cause for reversing the judgment.

Complaint is made because the court permitted the defendant's witnesses, Collins and Moss, to testify, over the objections and exceptions of plaintiff, that W. A. Nye, the principal maker of the note in controversy, disposed of certain mortgaged property during the existence of the lien and without the consent of the mortgagee. This testimony was clearly incompetent and prejudicial. What has been said in discussing the preceding assignment applies to this. From the fact that Nye disposed of mortgaged chattels contrary to law, the inference is not permissible that he forged the name of Fraser to the note, or that the latter did not execute the instrument. Equally erroneous was the admission over plaintiff's objection of the testimony of the witness T. L. Adams to the effect that Nye was financially bankrupt. The experience of the past has not

shown that the rich alone are honest. It is not a crime to be poor, nor can the insolvency of a person be shown for the purpose of establishing that he has committed a forgery.

It is also insisted that the court erred in permitting the witness Sams to testify to a conversation had with Nye to the effect that the latter stated to the witness he could imitate the signature of any person. We think the contention is well taken and that the objection to the testimony made when offered should have been sustained. The testimony was hearsay. Nye was not a party to the suit, not having been served. Moreover, had he been duly summoned, the evidence would have been irrelevant and incompetent, since it would be the proving by one defendant the declaration of a co-defendant made in the absence of the plaintiff. The evidence could not in the least tend to prove or disprove whether Fraser appended his name to the note in question, or whether or not his name was forged by Nye. The admission of this testimony was highly prejudicial to the rights of the plaintiff.

Other errors are assigned, both upon the admission and exclusion of testimony, and upon the giving and refusing of instructions, but the conclusion reached makes it unnecessary to consider them. For the errors pointed out the judgment is reversed, and the cause remanded for a new trial.

REVERSED AND REMANDED.

CHARLES E. STRATTON V. GEORGE MEREDITH.

FILED JUNE 22, 1895. NO. 5890.

Damages: VIOLATION OF PROMISE TO PURCHASE NOTES. Where one promises that he will, at a certain price, purchase certain notes, if the person to whom such promise is made shall procure

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the title to said notes by an exchange therefor of other property, and by such promise causes the proposed exchange to be made, he is bound by his promise, and is liable for payment of such damages as by the violation of said promise he has caused to the promisee.

ERROR from the district court of Douglas county. Tried below before DAVIS, J.

C. A. Baldwin, for plaintiff in error.

Slabaugh & Rush, contra.

RYAN, C.

This action was brought in the district court of Douglas county for the recovery of damages which the plaintiff in said court averred that he had sustained by reason of the fraud and deceit practiced upon him by the defendants. It was alleged by the plaintiff in his petition that he had been the owner of a certain lot in Omaha; that the defendants conspired fraudulently to obtain from said plaintiff a conveyance of his interest in said lot, for which purpose defendant Wilkinson offered to exchange for plaintiff's said interest two notes of \$400 each, secured by a mortgage on certain land in Brown county, and represented that said notes were of the value of \$750, which sum defendant Stratton would be willing to pay for them if plaintiff would consent to exchange his interest in the lot which he owned for said notes. It was further averred in said petition that these representations were made for the purpose of inducing plaintiff to part with his lot without any intention or expectation on the part of the defendants that Stratton would purchase said notes from plaintiff; that the plaintiff, relying upon the aforesaid representations, made the exchange as he had been solicited, and duly conveyed his lot, receiving in exchange therefor the notes and mortgage aforesaid, and that thereafter defendant Stratton absolutely refused to purchase said notes. It was furthermore

alleged by the plaintiff that the notes and mortgage securing the same were worthless, and were so known to be by the defendants when by their representations and promises they induced plaintiff to exchange his lot for them. In his answer the defendant Stratton admitted that there were certain negotiations between himself and plaintiff about said notes, but he denied that he ever represented that he would purchase the same, or that said notes were of any value, and denied that, between himself and his co-defendant, there had been any agreement or conspiracy whatever. There was a verdict and judgment against both defendants for the sum of \$877.60.

The defendant Stratton alone prosecutes error to this court. There was a sharp contradiction and irreconcilable conflict between the evidence adduced by one side and that submitted by the other. That for the plaintiff was of such a nature that, if believed by the jury, there was disclosed a design on the part of Stratton to procure Meredith to part with the title to his lot in exchange for the two notes secured by mortgage described in plaintiff's petition, which were worthless; that to accomplish this purpose he represented to Meredith that if by the exchange of his lot Meredith should become the owner of the aforesaid notes, he, Stratton, would purchase them for \$750, a sum known by him to be satisfactory to Meredith, and that, relying upon the representations made by Stratton as of his own personal knowledge that the Brown county land mortgaged was very valuable, and that if Meredith secured the aforesaid notes in trade, he, Stratton, would pay the above proposed consideration for an assignment of them, plaintiff conveyed his lot and obtained the notes and mortgage aforesaid, which Stratton has ever since refused to purchase at any price whatever. It is doubtful whether, by direct proofs, there was shown an actual conspiracy between Wilkinson and Stratton to bring about the result which in fact was accomplished. There was, however, sufficient to es-

tablish a common purpose, and for its success the evidence was ample to justify the jury in finding that Stratton was directly and entirely responsible. The result testified to is that for the interest which the defendant in error once had in the lot exchanged for the above mentioned notes he has received absolutely nothing. There was evidence that the interest of which the defendant in error was deprived was of the value of \$800. If these facts were established defendant in error was entitled to maintain an action against Stratton. The contradictory proofs made by plaintiffs in error were direct negatives of those presented by the defendant in error. From a consideration of the bill of exceptions alone it would appear that Stratton had successfully disproved the facts which the testimony against him tended to establish. The verdict of the jury was otherwise, and this verdict was sanctioned by the presiding judge when he overruled the motion of Stratton for a new trial. The deportment of different witnesses, especially when interested parties themselves take the stand, is often very convincing. There is no way known by which this disadvantage can be counterbalanced, and, under these conditions, the only course open in this court is to accord to the verdict of the jury, sanctioned by the approval of the trial judge, a conclusiveness little short of absolute verity as to facts in reference to which the evidence is found conflicting. (*Worthington v. Worthington*, 32 Neb., 334; *Brown v. Hurst*, 3 Neb., 353; *Helling v. New England Mortgage Security Co.*, 10 Neb., 611; *Courtney v. Price*, 12 Neb., 188; *Jennings v. Simpson*, 12 Neb., 558.) There is found no error in the record and the judgment of the district court is

AFFIRMED.

CARL WALDOW ET AL., APPELLANTS, V. A. D. BEEMER,
ADMINISTRATOR, APPELLEE.

FILED JUNE 22, 1895. No. 6257.

1. **Administration of Estates: ORDER OF SALE: REVIEW.** An order of the district court licensing the sale by an administrator of mortgaged premises for the payment of debts of a decedent will not be reversed where the proofs fail affirmatively to show that such order was improper.
2. **Appointment of Administrator: REGULARITY OF PROCEEDINGS.** Whether or not an administrator has regularly been appointed such cannot be inquired into or determined in resisting his application for license to sell real property for the payment of debts.

APPEAL from the district court of Cuming county.
Heard below before NORRIS, J.

Uriah Bruner, for appellants.

M. McLaughlin, *contra*.

RYAN, C.

This is an appeal from an order for the sale of real property of William Waldow, deceased, for the payment of debts and costs of administration. There were many objections presented, of which such as are at all important shall be considered in a general way to avoid the confusion which a detailed history of all the facts pleaded and proved would necessarily involve.

The petition contained averments that there had been allowed against the estate of William Waldow debts to the amount of \$1,230.50, and costs of administration to the amount of \$250; that the real property necessary to be sold consisted of two tracts of land containing 160 acres each. In the objections filed to the petition it was asserted

that William Waldow left a will, which in the county court of Cuming county on April 28, 1888, was probated, from which order of probate an appeal was duly taken by the contestants to the district court of said county, wherein on March 22, 1889, a verdict was rendered in favor of the proponent, but that no judgment was rendered thereon until February 3, 1891—nearly two years after said verdict had been found. It was also alleged that on the 13th of February, 1889, T. M. Franse filed a claim in the aforesaid county court against said estate for the principal sum of \$95, and interest \$75, on a note made to him by William Waldow, which claim was allowed in the sum of \$216.18. This claim it was alleged was assigned to Daniel C. Giffert, upon whose application A. D. Beemer was appointed administrator of the estate of William Waldow on December 2, 1889. The contention by appellants is, that as the claim of Franse was filed and allowed before administration granted that this allowance was without jurisdiction in the county court to make it, and furthermore it is insisted that until a judgment had been rendered upon the verdict sustaining the will in the district court the contest in respect thereto was pending, and that meantime an appeal undertaking having been given, the county court had jurisdiction neither to appoint an administrator of, nor to allow a claim against, the estate of William Waldow. From one of these premises it is argued that Mr. Beemer had no standing to act as administrator, and from the other that there was proved no claim rendering necessary the sale of the real property ordered by the district court. In respect to the first of these it is sufficient to say, Mr. Beemer's appointment and qualification as administrator were at most irregular and cannot be collaterally impeached in this proceeding. As to the insufficiency of the claim allowed in favor of Mr. Franse, it may be conceded that the statute requires the appointment of an administrator before such a claim can be allowed against an estate. In this case, however,

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appellants themselves made proof that this claim had been filed and allowed. It is, to say the least, questionable whether they now should be permitted to assail its validity. We are not called upon, however, to determine this question, for upon the pleadings it must be accepted as a fact that there were costs of administration which justified a sale of real property since the proofs showed the want of any personalty. If too much was allowed sold the statute provides for such a contingency. As to the objection that the district court, after its license to sell for payment of debts incurred in administration, ordered that the proceeds should be "invested in some productive stocks," it is deemed proper to say that this does not affect the validity of the order of sale. There was a mortgage on each tract ordered sold, and we cannot say that the permission to sell, subject thereto upon a showing of \$250 costs of administration, admittedly due, was erroneous or unjustifiable. The judgment of the district court is therefore

AFFIRMED.

ROSS R. MATTIS, TRUSTEE, ET AL., APPELLEES, V. JOHN
CONNOLLY ET AL., APPELLEES, IMPEADED WITH
G. M. STECKMAN ET AL., APPELLANTS.

FILED JUNE 22, 1895. No. 6442.

Bill of Exceptions: ALLOWANCE BY CLERK: REVIEW. In this case there are discussed only questions of fact, and as the bill of exceptions was settled by the clerk of the district court without any agreement upon it, these questions cannot be considered.

APPEAL from the district court of Pawnee county.
Heard below before BUSH, J.

H. C. Lindsay, Humphrey & Raper, and Story & Story,
for appellants.

W. W. Giffen, G. E. Becker, and J. J. Baker, contra.

RYAN, C.

In this case the bill of exceptions was signed by the clerk upon a stipulation that he should settle and allow it. There was, however, no agreement upon the bill of exceptions, and following *Scott v. Spencer*, 42 Neb., 637, we cannot treat it as such. We find that the briefs of counsel, upon which, without oral argument, this cause was submitted, discuss only questions of fact. These we cannot advisedly consider, and the judgment of the district court is

AFFIRMED.

CHARLES E. STRATTON V. WILLIAM H. WOOD ET AL.

FILED JUNE 22, 1895. No. 5889.

Pleading: AMENDMENT DURING TRIAL. The giving of leave to make an amendment of a petition in the course of a trial, when such amendment does not substantially change the nature of the plaintiff's claim, is within the discretion of the district judge.

ERROR from the district court of Douglas county. Tried below before DAVIS, J.

C. A. Baldwin, for plaintiff in error.

Slabaugh & Rush, contra:

RYAN, C.

The plaintiff in error, with Stephen Milholm, were charged in a petition filed in the office of the clerk of the district court of Douglas county with having by a fraudulent conspiracy obtained from the defendants in error a

stock of groceries of the value of \$275 without consideration. The manner in which it was charged that the wrong complained of was accomplished was this: Milholm agreed to purchase said groceries for \$250 in cash, but, as he was unable to pay this amount at once, it was agreed between him and the defendants in error that certain notes secured by mortgages should be given the defendants in error as security until the morning following the day on which the agreement to sell was entered into; that Stratton agreed to pay said sum of \$250 on said next day, if the defendants in error would deliver the goods already agreed to be purchased by Milholm, and by the means described it was charged that Stratton and Milholm were endeavoring to cheat and defraud the defendants in error of their stock of groceries and the pay therefor. It was further alleged that immediately thereupon the plaintiff in error took said groceries and removed them beyond the control and knowledge of the defendants in error; that plaintiff in error wholly refused to comply with their agreements; that in obtaining said groceries Milholm was but the tool of Stratton; that the notes and mortgages which Stratton promised to cash were worthless; that the defendants in error, believing the promises and representations of Milholm and Stratton to be true, transferred the aforesaid groceries as above described.

There is complaint made because during the trial the above petition was amended by the insertion of this language: "That said Stratton did not at the time he so agreed and represented so to do intend to carry out or fulfil said representations and agreements that he would buy said notes and mortgages and pay said amount for them as aforesaid, and said Milholm knew of said agreement and knew that said Stratton did not intend to do as he agreed." The plaintiff in error characterizes as unheard of, the submission of the case to a jury before this amendment had been made and two days before the answer to the amended peti-

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tion was in fact filed. The amendment was made, as had been indicated that it would be made, before the submission of the cause. An answer was permitted to be filed *instantly*, but the actual filing was delayed two days. For this last circumstance the defendants in error were not responsible. The right to allow amendments which do not materially change the original claim of plaintiff is expressly recognized in the provisions of section 144 of the Code of Civil Procedure. There was no abuse of this discretion, as will readily be seen upon consideration of the averments originally made in connection with the above quoted amendment. There was a judgment by default against Millholm for the amount of damages claimed, and upon a trial to a jury of the issues presented by the amended petition and the answer thereto, there was judgment for a like amount on a verdict returned against Stratton. By the latter a petition in error has been filed, with a transcript of the record and the original bill of exceptions, in this court. It is not necessary to set out the evidence offered on either side. It is sufficient for every purpose to state that there was ample proof to justify the jury in finding every allegation of the amended petition was true. The conclusions of the jury upon the disputed questions of fact were approved by the refusal of the district court to grant a new trial. No proposition other than those already considered was argued by the plaintiff in error, and the judgment of the district court is

AFFIRMED.

GILMORE & RUHL, APPELLANTS, V. MARY M. SILVER,
APPELLEE, AND SUTTON EXCHANGE BANK ET AL.,
APPELLANTS.

FILED JUNE 22, 1895. No. 5780.

Dismissal of Plaintiffs' Appeal: CONTEST BETWEEN DEFENDANTS: REVIEW: PRACTICE. Where the original plaintiff had dismissed his appeal, leaving a controversy solely between defendants as to respective priorities of mortgages, the defendants having stipulated, in effect, that the mortgage to one of their number was first recorded and that in terms every other mortgage was made subject to this particular one, *held*, in the absence of facts pleaded and corresponding relief prayed entitling to other relief, that this court should not reverse the judgment of the district court recognizing and confirming the priority of the mortgage as stipulated in the mortgages specially made subject thereto.

APPEAL from the district court of Clay county. Heard below before HASTINGS, J.

E. E. Hairgrove and *Leslie G. Hurd*, for appellants.

Thomas H. Matters, *contra*.

RYAN, C.

The petition of Gilmore & Ruhl was filed in the district court of Clay county on January 14, 1892, in which Mary M. Silver and others were named as defendants. The defendants joined with Mary M. Silver were the former members of the firm of Hayes & Silver, and a large number of the creditors of said firm. It was alleged in the petition that Edwin J. Hayes and Richard S. Silver had been doing business in Sutton under the firm name of Hayes & Silver; that on August 12, 1891, said firm had executed its note to plaintiff for \$325.45 and secured it by giving a chattel mortgage on the merchandise of said firm,

which mortgage was filed for record on the 15th day of August aforesaid; that on August 12 aforesaid the firm of Hayes & Silver made to Mary M. Silver a chattel mortgage on the stock of goods above mentioned, which mortgage was recorded on the day of its execution. It was averred that at the time of making its mortgage to Mary M. Silver the firm of Hayes & Silver was not indebted to Mary M. Silver in any sum whatever; that on August 13th, 1891, there was executed by the firm of Hayes & Silver thirteen chattel mortgages on the aforesaid merchandise, each mortgage being made to a person or firm therein described, was filed for record on the day of its execution; that on August 15 aforesaid the firm of Hayes & Silver executed twelve more chattel mortgages on the same property as had before been mortgaged, and that these, on the same day they were made, were filed for record. There were described other and subsequent mortgages upon the merchandise above described. All parties referred to as mortgagees of the firm of Hayes & Silver were joined as defendants with Mary M. Silver and her husband, Richard S. Silver, and his former partner, Edwin J. Hayes. It was further alleged in the petition that, in accordance with a stipulation entered into by all the parties concerned, the merchandise aforesaid had been sold and the proceeds paid into the hands of the said clerk of the district court. The prayer of the petition was for judgment against Hayes & Silver, Edwin J. Hayes, and Richard S. Silver for the amount alleged to be due the plaintiff; that the mortgage made to Mary M. Silver be declared null and void; that the mortgage to Cohen Bros. be declared no lien on the mortgaged property, and that the proceeds of the sale aforesaid should be equitably distributed among the various mortgagees. The record does not show when the service of summons was made, either on the above mortgagors or on Mary M. Silver. The mortgagors made default and Mrs. Silver filed her answer to the above petition on February

16, 1892. It is not necessary to describe the answer, for, as between the defendant and plaintiff, a full settlement has been made of all matters in controversy between them and a stipulation of a dismissal accordingly has been filed in this court. The next pleading was filed February 26, 1892, and was in terms an answer of John L. Lemon, trustee, and R. B. Smith & Co. to the above petition, although within it were the averments that the mortgage given to Mary M. Silver "was obtained by fraud and misrepresentation as alleged in the third count of the aforesaid petition," and that Mrs. Silver had never taken possession under her mortgage. As to the mortgage to Mary M. Silver, it was prayed in the petition that said mortgage be declared null and void and of no effect, and in other respects the prayer was as in the plaintiff's petition already described. On February 26, 1892, there was filed an answer by twenty-five of the creditors of the firm of Hayes & Silver. These defendants admitted all the allegations of the petition to be true except as by said answer certain averments thereof should be specifically denied. The qualifications referred to were of no practical importance in the present condition of this controversy. As in the answer of John L. Smith, trustee, and R. B. Smith & Co., there were averments in this answer that the mortgage to Mary M. Silver obtained by fraud and misrepresentation as alleged in the third paragraph of the plaintiff's petition, and this was coupled with the allegation that Mrs. Silver was never in possession under her chattel mortgage. There was a prayer for the same relief as was prayed in the answer of John L. Lemon and R. B. Smith & Co., already described as being identical with that in the plaintiff's petition. Mrs. Silver had no notice of the answers of her co-defendants and there was no reply thereto by her. Since each of these answers was filed ten days after her answer to the original petition was filed, it might be safe to assume that they were filed after the answer day had passed. It is

doubtful whether in any event the co-defendants of Mrs. Silver, under these circumstances, could properly obtain affirmative relief as against the mortgage to her. The dates of the mortgages have already been sufficiently given to indicate that the one given Mrs. Silver was filed before any of those held by her co-defendants. On the trial it was stipulated that "all of the last-named mortgages are made subject in express terms to all mortgages, liens, and incumbrances at the time they were filed." It requires no argument to show that the issues between Mrs. Silver and her co-defendants were not such that the express provision referred to in the above stipulation as being contained in the mortgage to each of the said defendants could be ignored or set aside. Such facts as justified an avoidance of this kind, if any such existed, were not pleaded, neither was there prayer for such relief as would have been appropriate, even if proper averments of the facts had been contained in the aforesaid answers. Under these circumstances the judgment of the district court must be, and accordingly it is,

AFFIRMED.

KEARNEY CANAL & WATER SUPPLY COMPANY V.
OLAFF AKEYSON.

FILED JUNE 22, 1895. No. 6220.

1. **Waters: CANAL EMBANKMENTS: NEGLIGENCE: DAMAGES: EVIDENCE.** A farmer sued a canal company for damages for the destruction of his crops, alleging that the canal company had failed to properly keep and maintain its canal embankments in good repair, by reason of which a large quantity of water ran over the banks of said canal on the farmer's crops. The evidence showed that the farmer's lands had never been overflowed prior to the construction of the canal; that after its construction his lands were overflowed in 1888, 1889, 1890, and 1891; that a

part of the embankment of the canal was washed away; that in the year 1891 farmers in the vicinity "cultivated the canal embankments, which lowered them so that the water would flow over more readily." *Held*, That the jury was justified in inferring from this evidence that the canal company had been guilty of negligence in the manner of maintaining the embankments of its canal.

2. **Negligence: EVIDENCE.** A verdict for negligence may be supported by inference when the inference is the logical, probable, and reasonable deduction from proved or conceded facts. (*Kilpatrick v. Richardson*, 40 Neb., 478.)

ERROR from the district court of Buffalo county. Tried below before HOLCOMB, J.

Marston & Nevius, for plaintiff in error.

Greene & Hosteller, contra.

RAGAN, C.

Olaff Akeyson brought this suit in the district court of Buffalo county against the Kearney Canal & Water Supply Company (hereinafter called the "Canal Company"). The Canal Company is a corporation organized under the laws of the state, and had constructed, owns, and at the time of the occurrence of the events of which this suit arose was operating, a canal from the Platte river to the city of Kearney. The canal tapped the Platte river some twelve miles west and southwest of the city of Kearney, and thence passed along in a northeasterly direction, leaving the lands of Akeyson about one and one-half miles south of the canal. The action of Akeyson was to recover damages which he alleged he had sustained by waters overflowing from this canal, running on his land, and destroying his crops. He had a verdict and judgment and the Canal Company has prosecuted to this court a petition in error.

1. The first assignment of error is that the verdict of the jury is not supported by sufficient evidence. We think

it is. The evidence is practically undisputed that the waters overflowed from this canal and damaged Akeyson's crops. But it is argued that the evidence fails to show this resulted from the negligence of the Canal Company. The record does not show just how the canal was constructed nor how it was operated; but it does show that west of Akeyson's farm the canal crossed a little stream called Beaver creek, and was constructed across the entire water-shed of Beaver creek; that Akeyson's land lies in this water-shed of Beaver creek, and that the canal was constructed of sufficient capacity to carry away one-third of the surface water resulting from rains and melting snows on this Beaver creek water-shed; and it is inferable at least from the evidence that the entire water-shed of Beaver creek slopes to the south and east towards the Platte river. The negligence charged by Akeyson to the Canal Company was that it had failed to carefully keep and maintain its canal and embankments in good repair and condition, and by reason of the insufficiency of the embankments, large quantities of water ran through and over said banks, and was carried down and discharged in a volume on Akeyson's lands. The evidence is practically undisputed that prior to the construction of this canal these lands of Akeyson's had never been overflowed, but that after the construction of the canal they overflowed in 1888, 1889, 1890, and 1891; and the witnesses for the Canal Company themselves testified that a part of the embankment of the canal was washed away; that there never had been but one or two breaks in the canal; that in the year 1891 the farmers cultivated the embankments, which lowered them so that the water would flow over more readily. Now from this testimony we think the jury was entirely justified in inferring that the Canal Company had been guilty of negligence in the manner of maintaining the embankments of its canal. A verdict for negligence may be supported by inference, but the inference must be the logical, probable, and rea-

sonable deduction from proved or couceded facts. (*Kilpatrick v. Richardson*, 40 Neb., 478.)

2. The second and third assignments of error argued relate to the action of the district court in admitting and rejecting evidence on the trial. We cannot review these assignments, for the reason that they are too indefinite. The assignments are: "The court erred in admitting improper evidence to go to the jury on behalf of the plaintiff;" and, "The court erred in excluding from the jury proper and competent evidence on behalf of the defendant."

3. The fourth assignment is that the court erred in giving to the jury an instruction in the following language: "The defendant could not be held responsible for any damage caused by the cutting of the embankment of the canal, until a reasonable time had elapsed in which to repair the same, after no ice of such cut; neither could it be held liable for overflows caused by unprecedented heavy rainfalls or any other unforeseen causes which could not be provided against by the exercise of a reasonable degree of care and caution." The criticism on this instruction is the use of the word "unprecedented." It is said that this really means such a rainfall as was never known before,—a rainfall without precedent. We think the instruction would have been better had the court used the word "extraordinary" or "unusual" instead of "unprecedented;" but the Canal Company was not prejudiced by the use of this word by the court, for in the sixth instruction given to the jury at the request of the Canal Company the court told the jury that if the overflow complained of was caused by unusual floods or from ice gorges which could not be prevented by the defendant in the exercise of ordinary care, it was not liable for any damages that resulted from such overflow.

4. The fifth assignment is that the court erred in refusing to give the jury the following instructions:

(1.) "If the canal was made and maintained of sufficient capacity to carry all the water it took from the Platte river and the overflow, if any has been proved, was caused by the natural rainfall in the water-shed and basin of Beaver creek, then the defendant would not be liable for damages caused by such overflow.

(2.) "If you believe from the evidence that the land of the plaintiff is located on Beaver creek, and that all the surplus natural rainfall on the water-shed and basin of said Beaver creek would be carried by said creek over and through the land of the plaintiff, as its natural and only course, and if you further believe from the evidence that the canal was of sufficient capacity to and did carry all the water it received from the Platte river, then you are instructed that if the volume of water in the canal was increased only by the natural rainfall on the water-shed of Beaver creek and therefore overflowed the banks of the canal anywhere within the water-shed drained by said creek, and then flowed over the land of plaintiff, the defendant would not be liable for damage caused by such overflow."

The court did not err in refusing to give the first of the two instructions complained of for this reason at least, there is no evidence in the record that the waters which destroyed Akeyson's crops were surface waters which accumulated on the water-shed or basin of Beaver creek; or, if it may be said that there is some evidence on that subject, it is not of such a character as enables us to say that the district court erred to the prejudice of the Canal Company in refusing to give the instruction.

The court did not err in refusing to give the second instruction of the two under consideration because there was no evidence in the record on which to base such an instruction. The evidence in this record does not show that the waters which damaged Akeyson's crop overflowed the embankment of the canal as the result of surface waters from

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the water-shed and basin of Beaver creek flowing into the canal. The evidence, it is true, shows that such a thing might happen, that it could happen; but that it did happen is a mere conjecture. But if it appeared from the evidence that the waters which flowed from the banks of the canal and damaged Akeyson's crops were surface waters from the basin of Beaver creek which the canal embankment had stopped and accumulated in the canal, then of a certainty the instruction should not have been given, for that would show that the Canal Company, by building the embankment of the height and in the manner it did, had collected together the surface waters from the basin of Beaver creek, and thereupon discharged them in a body on Akeyson's land, and this would have rendered the Canal Company liable for the damages. (*Lincoln Street R. Co. v. Adams*, 41 Neb., 737.)

There is no error in the record, and the judgment of the district court is

AFFIRMED.

WILLIAM S. FLENTHAM, APPELLANT, v. DANIEL O.
STEWART ET UX., IMPEADED WITH JAMES W.
DAWES ET AL., APPELLEES.

FILED JUNE 22, 1895. No. 5693.

1. **Action Against Receiver Without Leave of Court:**
VOLUNTARY APPEARANCE: WAIVER: JURISDICTION. D. & F., copartners, guarantied in writing the payment of a debt secured by a real estate mortgage. Litigation ensued between them, and a receiver was appointed to take charge of the copartnership property. The holder of the mortgage brought suit to foreclose the same, making D. & F. and their receiver parties defendant without leave of the court which appointed the receiver. D. & F. and the receiver entered their voluntary appearance to the foreclosure suit. The receiver filed an answer in the nature of a cross-petition setting up a second mortgage

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belonging to D. & F., on the premises in controversy, and was by the decree of the court awarded a foreclosure of such mortgage. The property was duly sold, and after applying the proceeds of the sale to the satisfaction of the decree there still remained a considerable sum due thereon. The holder of the first mortgage then filed a motion for a personal judgment against D. & F. and their receiver for the balance due on his decree. This motion was resisted on the ground that the receiver had been sued without leave of the court which appointed him, and that therefore the court in which the mortgage foreclosure suit was pending had no jurisdiction over him. *Held*, (1) That the general rule is that a receiver may not be sued without leave of the court which appointed him; (2) but if this rule is applicable to such a case as the one at bar, then the fact that a receiver has been sued without leave is a matter of defense for him in the action where sued; (3) that the suing a receiver without permission does not render invalid the process of the court served on him nor prevent the jurisdiction of the court in which he is sued from attaching to his person; (4) that a judgment pronounced against a receiver so sued is not absolutely void for want of jurisdiction; (5) that the receiver having voluntarily entered his appearance in the action, and having asked the court for and obtained affirmative relief, must be presumed to have submitted himself to the jurisdiction of the court and to have waived the defense of being sued without leave of the court which appointed him.

2. **Mortgages: DEFICIENCY JUDGMENTS.** The district courts of this state in suits brought therein for the foreclosure of mortgages, on the coming in of the report of sale of the mortgaged premises, are authorized to render a personal judgment and award execution for any deficiency remaining unpaid on the decree. (Sec. 847, Code of Civil Procedure.)
3. **Courts of Equity: JURISDICTION.** When a court of equity acquires jurisdiction over a case for any purpose it may retain the cause for all purposes and proceed to a final determination of all the matters at issue in the case. *Morrissey v. Broomal*, 37 Neb., 766, followed.
4. **Guarantor of Note: LIABILITY.** One who before maturity unconditionally guaranties the payment of a promissory note becomes absolutely liable upon the default of the maker; and the neglect of the holder of such note to sue the maker does not discharge such guarantor, although the maker becomes insolvent during the time the holder neglects to sue. *Huff v. Slife*, 25 Neb., 448, followed.

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APPEAL from the district court of Hitchcock county.
Heard below before WELTY, J.

*Sawyer & Snell, Victor Seymour, and J. E. Cochran, for
appellant.*

James W. Dawes and F. I. Foss, contra.

RAGAN, C.

On the 5th of August, 1889, one Daniel O. Steward made in writing of said date his promissory note for \$500, due on August 1, 1894, with interest at the rate of seven per cent per annum, payable annually, such interest evidenced by coupons or interest notes of \$35 each, attached to said principal note. This principal note and coupons were made payable to the order of one Dan. H. Cole. To secure the payment of said debt Steward executed to Cole a mortgage upon certain real estate in Hitchcock county. This mortgage debt Cole duly assigned to William S. Flentham. The notes and mortgages were executed by Steward to Cole in consideration of a loan of \$500 made by the latter to Steward in August, 1889. The loan was negotiated by Dawes & Foss, copartners, and at the time of the delivery of the notes, coupons, and mortgage to Cole, Dawes & Foss, in writing, guarantied the payment of said principal note and the coupons. It appears also that Steward paid, or promised to pay, Dawes & Foss a certain compensation for procuring this loan for him, and to secure the compensation promised Steward gave Dawes & Foss a second mortgage upon the same real estate which he had pledged to Cole. It appears that trouble arose between James W. Dawes and Fayette I. Foss, the individuals composing the copartnership of Dawes & Foss, that litigation ensued, and that the court in which such litigation was instituted appointed one Charles C. White receiver of the effects of said copartnership of Dawes & Foss. Default hav-

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ing been made in the payment of the mortgage debt, William S. Flentham, Cole's assignee, brought suit in the district court of Hitchcock county to foreclose the mortgage. Daniel O. Steward and his wife, James W. Dawes, Fayette I. Foss, and Charles C. White as receiver of the copartnership effects of Dawes & Foss, were made parties defendant to the action. The connection of Steward and wife with the case need not be noticed. Dawes & Foss and White, the receiver, entered their voluntary appearance to the suit of Flentham. In due time a decree was rendered finding the amount due Flentham on his mortgage debt and giving him a first lien upon the mortgaged premises to secure its payment. The court also found the amount due Dawes & Foss and the receiver on the second mortgage given to them by Steward, and that Dawes & Foss and the receiver had a second lien upon the mortgaged premises to secure the amount found due them. The real estate was then sold by the sheriff at public auction and purchased by Flentham. After applying the amount bid at the sale towards the payment of Flentham's decree and the costs of the foreclosure proceedings there still remained a balance due on his decree. Flentham moved the court for a personal judgment against Dawes & Foss and the receiver for the balance remaining unpaid on the decree. The district court denied this motion, and from this order Flentham has appealed. In the petition filed by Flentham for the foreclosure of his mortgage he averred that Dawes & Foss had guarantied in writing the payment of the mortgage debt, setting out a copy of the guaranty, and that White had been appointed receiver of the effects of the copartnership of Dawes & Foss; and prayed in the petition for a personal judgment against Dawes & Foss and White, as receiver, for any deficiency that might be due him after applying the proceeds of the sale of the mortgaged property towards the liquidation of the mortgage debt. To sustain this decree counsel for the appellees contend :

1. That as the copartnership effects of Dawes & Foss were in the hands of a receiver the latter could not be sued without leave of the court which appointed him, and as such leave was not obtained, the district court of Hitchcock county had no jurisdiction over the copartnership of Dawes & Foss, nor over the person of the receiver. The general rule undoubtedly is that a receiver may not be sued without leave of the court which appointed him; but if this rule is applicable to such a case as the one at bar it would seem that the fact that the receiver had been sued without leave of the court appointing him was a matter of defense for the receiver, and that the suing him without permission of the court which appointed him would not of itself render invalid the process of the court served on him, nor prevent the jurisdiction of the court in which he was sued from attaching to his person; and that a judgment pronounced against such receiver would not be absolutely void for want of the court's jurisdiction over him, because the record did not disclose that the party bringing the suit had first obtained leave of the court who appointed the receiver to sue him. The receiver having voluntarily entered his appearance in this action, and not having objected to the jurisdiction of the court over him in any manner, and having asked the court for and obtained affirmative relief in the action by taking a decree on the mortgage of Dawes & Foss, the question of the jurisdiction of the district court over the receiver comes too late, and he must be deemed to have submitted himself to the jurisdiction of the court and to have waived the defense of being sued therein without leave of the court which appointed him. (*In re Young*, 7 Fed. Rep., 855; *Naumburg v. Hyatt*, 24 Fed. Rep., 898; *Hubbell v. Dana*, 9 How. Pr. [N. Y.], 424; *Jay's Case*, 6 Abb. Pr. [N. Y.], 293.)

2. A second argument insisted on to sustain the correctness of the decree is that the record does not show that

Foss, of the firm of Dawes & Foss, ever guarantied the payment of the mortgage debt.. This contention is wholly without merit. The guaranty made by Dawes & Foss of the payment of this mortgage debt was in writing and became and was a joint and several obligation of the members composing this copartnership.

3. A third contention is that the decree was correct because Dawes & Foss and the receiver had no notice of Flentham's application for a deficiency judgment. The recital in the record is as follows: "Now on this the 2d day of June, 1892, * * * this cause coming on for confirmation, * * * the defendants are allowed by the court until June 3, 10 o'clock A. M., to show cause why said sale should not be confirmed and deficiency judgment rendered against James W. Dawes and Fayette I. Foss, etc. * * * And now on this 3d day of June, 1892, the defendants having failed to show cause why said sale should not be confirmed, * * * it is ordered that said proceedings be and they are hereby approved, ratified, and confirmed. * * * And thereafter the same day the cause came further on for hearing on motion of plaintiff for deficiency judgment against the defendants James W. Dawes and Fayette I. Foss, in consideration whereof the court overruled said motion," etc. Here then is a recital in the record that Dawes & Foss had actual notice of the application by Flentham for a deficiency judgment; that they applied for and were given time in which to resist said application.

4. Another contention in support of the decree is that the rendering of a deficiency judgment in a mortgage foreclosure case is the exercise by the court of its legal functions; and that a court of equity has no jurisdiction to render such judgment. Section 847 of the Code of Civil Procedure expressly authorizes the district courts of this state, in a suit for the foreclosure of a real estate mortgage, on the coming in of the report of sale of the mortgaged premises,

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to decree a judgment and award execution for any deficiency remaining unpaid on the decree after the sale of the mortgaged property. The familiar principle is that when a court of equity acquires jurisdiction over a cause for any purpose, it may retain the cause for all purposes, and proceed to a final determination of all the matters at issue in the case. (*Morrissey v. Broomal*, 37 Neb., 766; *Buchanan v. Griggs*, 20 Neb., 165.)

5. The final contention in support of the decree is that the record does not show that Flentham had exercised due diligence to collect the mortgage debt; and that therefore the guarantors of the debt had been released from their obligation. No such defense was interposed by Dawes & Foss or their receiver in the court below; nor is there in the record any evidence on the subject whatever. Nor do we think that any laches or want of diligence on the part of Flentham in his efforts to collect this mortgage debt would afford any defense to Dawes & Foss. In *Huff v. Slife*, 25 Neb., 448, this court held that one who before maturity unconditionally guaranties the payment of a promissory note becomes absolutely liable upon the default of the maker; and that the mere neglect of the holder of a note to sue the maker does not discharge the guarantor although the maker becomes insolvent.

The decree appealed from is reversed, and the cause remanded to the district court with instructions to render a personal judgment against James W. Dawes and Fayette I. Foss, and Charles C. White as receiver, for the amount remaining unsatisfied on the decree in favor of Flentham.

REVERSED AND REMANDED.

JAMES C. BRINKWORTH, APPELLANT, V. J. S. GRABLE
ET AL., APPELLEES.

FILED JUNE 22, 1895. No. 6302.

1. **Municipal Corporations: BONDS: REGISTRATION: DUTY OF STATE AUDITOR: INJUNCTION: INTEREST COUPONS: TAXES.** Municipal bonds bearing date November 1, 1889, due in twenty years, drawing interest at the rate of six per cent per annum payable semi-annually, evidenced by coupons maturing May 1, 1890, and each six months thereafter, issued to aid in the construction of a railroad, were deposited with the auditor of public accounts on the 21st of December, 1889, for certification and registration. The auditor was prevented by injunction proceedings from registering and certifying the bonds until January 1, 1891, at which time they were registered and certified. *Held*, (1) That as a matter of law the bonds were registered and certified on December 21, 1889; (2) as taxes levied in counties under township organization become due on the 1st day of October after their levy (secs. 83, 91, ch. 77, Compiled Statutes, 1893), (3) therefore, the auditor, when he registered said bonds, should have detached therefrom the coupons thereon which by their terms matured prior to October 1, 1890. (Sec. 37, ch. 9, Compiled Statutes, 1893.)
2. ———: ———: **TAXES.** Said section 37 construed, and *held* that the object of its enactment was to prevent the municipalities of the state from executing and putting upon the market their obligations for the payment of money which would by their terms mature before a tax could be legally levied and become due for the payment of the same.
3. ———: ———. It is settled law that a municipal corporation has no power to issue its bonds in aid of a work of internal improvement unless expressly authorized by statute to do so. *Young v. Clarendon Township*, 132 U. S., 340, followed.
4. ———: ———: **TAXES.** The municipal corporation had authority to issue the bonds in question, but it had no authority to issue and deliver interest coupons which would mature before a tax could be lawfully levied and become due for their payment.
5. ———: ———: **VALIDITY OF COUPONS.** That the coupons attached to said bonds which matured prior to October 1, 1890, were issued without authority of law, and were void even in the hands of an innocent purchaser.

APPEAL from the district court of Gage county. Heard below before BABCOCK, J.

E. O. Kretsinger, for appellant.

Gardiner Lathrop and Griggs, Rinaker & Bibb, contra.

RAGAN, C.

In 1889 and 1890 the city of Beatrice was a city of the second class having more than 5,000 and less than 25,000 inhabitants, situate in Gage county, then under township organization. In August, 1889, at an election held for that purpose, the electors of the city of Beatrice voted to issue its bonds in the sum of \$50,000, to aid in the construction of the Kansas City & Beatrice railroad. In August, 1889, the proper authorities of said city duly executed fifty of the bonds of said city, of \$1,000 each, drawing interest at the rate of six per cent per annum, payable semi-annually. The bonds were to run twenty years and bore date November 1, 1889. The interest was evidenced by coupons attached to the bonds. One thousand five hundred dollars of these coupons matured on the 1st of May, 1890, and a like sum at the beginning of each six months thereafter. The bonds were a donation on the part of the city to the railroad company. There is no question in the case as to the validity of these bonds, nor that the railroad company was entitled to them. In December, 1889, the bonds were presented to the auditor of state for registration and certification. About this time an injunction suit was instituted by a taxpayer of the city of Beatrice, and the auditor and the secretary of state, the city of Beatrice and its mayor and council were enjoined,—the auditor and secretary of state from registering and certifying the bonds, and the city and its officers from levying a tax to pay the interest thereon. This injunction continued in force until January 1, 1891, when it was dissolved.

And thereafter on the 2d of January, 1891, the auditor and secretary of state duly registered and certified the bonds. When the bonds were first presented to the auditor for registration in December, 1889, there were \$1,500 of coupons attached to said bonds which would mature before a tax could be lawfully levied and become due with which to pay the same, and when the auditor and secretary of state actually registered and certified the bonds, January 2, 1891, there were \$3,000 of matured coupons on said bonds, and \$1,500 of coupons attached to said bonds which would mature before a tax could be lawfully thereafter levied and become due to pay the same. At the time the auditor actually registered the bonds in question on the 2d of January, 1891, he did not detach from said bonds any coupons whatever. In June, 1891, the proper authorities of the city of Beatrice levied a tax, not only for the payment of the coupons which would mature on the 1st of November, 1891, after said levy, but also a sufficient tax to pay the coupons which matured in May and November, 1890, and May, 1891. The tax so levied was collected by the treasurer of the city of Beatrice, and out of this tax and before the bringing of this suit he paid and discharged the coupons which matured May 1, 1890. This action was brought by James C. Brinkworth, a citizen and taxpayer of said city, to enjoin the latter from paying any of the coupons on said bond which matured prior to the 1st day of May, 1892. The court rendered a decree dismissing the petition of Brinkworth, and he has appealed. Section 37, chapter 9, Compiled Statutes, 1893, provides: "That whenever a bond of any county, city, town, township, precinct, village, school district, or other municipality, shall be presented to the auditor of public accounts for registration, the auditor shall examine the interest coupons thereto attached, and shall detach as many of them as shall mature before the first taxes levied to meet the same, shall become due and collectible, and stamp said coupons

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‘Detached by the auditor of public accounts,’ and send to the treasurer of the county from which said coupons were issued.” To reverse this decree it is insisted that taxes levied upon the property of the citizens of the city of Beatrice become due and collectible on the 1st day of January after their levy, and that the officers of the city of Beatrice and the county authorities of said Gage county could levy no tax for the payment of these interest coupons after the time at which the auditor actually registered them, January 2, 1891, which tax would be collectible until January, 1892, and therefore it was the duty of the auditor to detach all the coupons which matured in May and November, 1890, and May and November 1891. But counsel is mistaken as to the time when taxes levied upon the property of the city of Beatrice become due and collectible. Such taxes become due and collectible on the 1st day of October after their levy. (See secs. 83, 91, ch. 77, Compiled Statutes, 1893.)

Assuming for the moment the correctness of the contention of appellant’s counsel, that the auditor at the time he actually registered these bonds, January 2, 1891, should have detached therefrom all coupons which had then matured and which would mature before a tax could be levied and become due for the payment of the same, the auditor should have detached only the coupons which matured on the 1st of May and November, 1890, and the 1st of May, 1891, as the proper city and county authorities could have levied a tax in June, 1891, for the payment of the coupons which fell due November 1, 1891, and this tax would have fallen due on the 1st of October of said year and been available for the payment of the coupons maturing in the following November. But these bonds were presented to the auditor for registration on the 21st of December, 1889. It was his duty to register and certify them at that time, and the record shows he would have done so but for the fact that he was prevented from so doing by the injunction

proceedings hereinbefore mentioned. The auditor and secretary of state then, when they did register and certify these bonds in January, 1891, should have registered and certified them as of the 21st of December, 1889, when they were received for registration, and it would have been entirely proper to have made the certificates of registration and certification show that the registration had been delayed by injunction proceedings, and for that reason the bonds were registered and certified as of December 21, 1889. Counsel for the appellant insists that the auditor and secretary of state could not do this, and that as the bonds were not actually registered until January 2, 1891, and as no taxes could be levied after that time for the payment of the coupons on these bonds, and which tax would mature prior to October, 1891, that it was the duty of the auditor to detach not only the coupons which would mature in May, 1891, but to detach the coupons which had matured in May and November, 1890, as no tax had been levied at the time the bonds were actually registered for the payment of such coupons. No authority is cited to sustain this contention; and with our knowledge of the well known legal ability of counsel for the appellant we rely with perfect confidence on the presumption that no such authority can be found. On the other hand, counsel for the appellees insist that the auditor should not have detached from these bonds any coupons whatever, as said section 37 of the statute quoted above has no reference to bonds issued by a city to aid a work of internal improvement. We do not agree with this contention. The statute applies to all bonds, and it is settled law that a municipal corporation has no power to issue its bonds in aid of a work of internal improvement unless expressly authorized by statute to do so. (*Young v. Clarendon Township*, 132 U. S., 340.) The object of the enactment of the statute, said section 37, was to prevent the municipalities of the state from executing and putting upon the market their obligations for the

payment of money which would by their terms mature before a tax could be legally levied and become due for the payment of the same. Indeed, we think this is the spirit of all the statutes of the state authorizing municipal corporations to issue bonds. The law authorized the city of Beatrice to issue its municipal bonds to aid a work of internal improvement, but it had no authority to issue and deliver an interest coupon which would mature before a tax could be lawfully levied and become due for its payment. The coupons on these bonds which matured in May, 1890, were issued without authority of law. They were absolutely void even in the hands of an innocent purchaser. (*Marsh v. Fullon County*, 77 U. S., 676.) These bonds then were, as a matter of law, registered December 21, 1889, and it was the duty of the auditor, under said section 37 of the statute just quoted, to detach from said bonds the coupons which matured May 1, 1890, and return them to the county treasurer of Gage county. After the injunction proceedings were dissolved it was the duty of the city of Beatrice, in Gage county, in June, 1891, to levy taxes for the payment of the coupons which would mature on the 1st of November, 1891, and for the coupons which had matured in November, 1890, and May, 1891, and for the payment of which no provision had been made by reason of the pendency of the injunction proceedings; or, in the language of section 79, chapter 77, Compiled Statutes 1893, it was the duty of the city authorities of Beatrice in June, 1891, to include in their levy of taxes a sufficient sum to pay the amounts then due upon all legal and valid bonds outstanding against the city. The coupons which matured November 1, 1890, and May 1, 1891, were legal and valid obligations outstanding against the city; but the coupons which matured on May 1, 1890, were not legal, valid, or binding obligations of the city, and the city authorities in June, 1891, should not have included in their levy any sum of money for the payment of such coupons.

We have said that the treasurer paid the coupons which matured on the 1st of May, 1890, before the bringing of this suit. The record shows: "And now, on this 28th of March, 1892, came the plaintiff and files his petition," etc. This petition was sworn to on the 27th of May, 1892, and at the end of the petition is the following: "Filed May 28, 1892. R. W. Laffin, Clerk of the District Court." The amended answer on which the action was tried, and the only one in the record, was sworn to on the 12th of April, 1893, but the record does not recite when this answer was filed. There is nothing in the record to show that any summons was ever served upon the treasurer, nor that any temporary injunction or restraining order was ever served on him. The case was heard on the 27th of May, 1893, and the decree recites that by stipulation the hearing was to be a final one, and the court authorized, after hearing the evidence, to enter a final decree instead of a temporary order of injunction. With the record in this shape we must presume that the treasurer paid the coupons which fell due on May 1, 1890, before the bringing of this action. We conclude, therefore, (1) that the bonds in controversy were registered and certified, in contemplation of law, on the 21st of December, 1889; (2) that the auditor should not have detached from said bonds any coupons except those which matured on the 1st of May, 1890; (3) that the authorities of the city of Beatrice in the levy of taxes made by them in June, 1891, properly included in such levy a sum sufficient to pay the coupons which matured on the 1st day of November, 1890, and the 1st day of May, 1891. The decree of the district court is, therefore, in all things

AFFIRMED.

VAN VALKENBURGH & SON V. MASON GREGG.

FILED JUNE 22, 1895. No. 6004.

1. **Sales of Goods: BREACH OF CONTRACT: DAMAGES: TENDER OF DELIVERY.** A vendor of goods cannot recover damages on account of the refusal of the vendee to accept, unless he tenders delivery of the goods in accordance with the contract.
2. ———: ———: ———: **DELIVERY.** Where a written contract specifies a place of delivery, delivery must be tendered at that place; and ambiguities in such written contract are to be solved in the same manner as ambiguities in other writings.
3. ———: **PLACES OF DELIVERY.** The shipment by a vendor at A of goods consigned to himself at B, the vendor making a draft for the price, and attaching the bill of lading thereto, is a tender of delivery at the point to which the goods are shipped, and not at the place of shipment.
4. ———: **CONTRACTS: PLACES OF DELIVERY: EVIDENCE.** A contract for the sale of goods was substantially as follows: "Bought of M. G. five (5) cars new shelled corn, track Ohioa or Tobias, at forty-five (45) cents per bushel, his weights, billing of same to be given by December 10, 1890. [Signed,] V. & Son." *Held*, That this was a contract for delivery at Ohioa or Tobias, the vendor to ship from either of those points to the vendee at a point designated by him, and that compliance with such contract was not proved by showing a shipment from one of those points to a point designated by vendee, the goods being consigned to the vendor.
5. ———: ———: ———: **WAIVER.** The fact that the vendee had received a portion of the goods consigned to the vendor at the point designated was a waiver only of the terms of delivery as to the goods so received, and did not waive delivery of the remaining goods according to the contract.

ERROR from the district court of Lancaster county.
Tried below before HALL, J.

The facts are stated by the commissioner.

Stewart & Munger, for plaintiffs in error:

A delivery by a seller to a common carrier of property

billed to the proper destination, but consigned to the seller's order is not a delivery or tender of delivery to the purchaser. (*Torcheimer v. Stewart*, 65 Ia., 593; *Newmark, Sales*, secs. 147, 407.)

The failure to ship the grain promptly and the delay in furnishing the bill of lading justified the refusal to accept the property. (*Barber v. Taylor*, 5 M. & W. [Eng.], 526; *Robinson v. Brooks*, 40 Fed. Rep., 525; *Rommel v. Wingate*, 103 Mass., 327; *Hoffman v. King*, 58 Wis., 314.)

Where delivery is made by installments, the buyer's acceptance of the first installment will not debar him from rejecting on proper grounds the portions subsequently delivered. (*Newmark, Sales*, secs. 231, 232, 265; *Hubbard v. George*, 49 Ill., 275; *Cohen v. Platt*, 69 N. Y., 348; *Norrington v. Wright*, 115 U. S., 188.)

Marquett, Deweese & Hall, contra.

IRVINE, C.

On December 4, 1890, the parties to this action entered into a contract as follows:

"Bought of Mason Gregg five (5) cars new shelled corn, track Ohioa or Tobias, at forty-five (45) cents per bushel, his weights, billing on same to be given by December 10, 1890.

VAN VALKENBURGH & SON."

It is agreed that the corn was shipped in large cars, three of which carried what the parties had understood as five cars. On the 6th of December Van Valkenburgh & Son wrote Gregg as follows:

"Please ship us at Beaver City one large car new corn. Draw on us through First National Bank, Minden, and have it come direct here with invoice. Parties are anxious for this car.

VAN VALKENBURGH & SON."

The car was shipped and was received by Van Valkenburgh & Son. On the 10th of December the following letter was written by Van Valkenburgh & Son:

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"Please ship at once a large car corn to us at Beaver City, and on Monday next load another large car to us at Beaver City. These three large cars that we have ordered will make the 2,500 bushels ordered and bought of you. Can you sell us more at same price? Would be pleased to hear from you how you understand these orders, and if you will ship them promptly.

"VAN VALKENBURGH & SON."

Gregg on receipt of this letter shipped the second car, and on the following Monday, being December 15, shipped the third car. The second car was received by Van Valkenburgh & Son. On the 15th, but after Gregg had shipped the third car, Van Valkenburgh & Son telegraphed him:

"Don't ship third car to Beaver City. Parties there refuse.
VAN VALKENBURGH & SON."

The car had already gone, and Van Valkenburgh & Son refused to receive it. Gregg, on learning of their refusal, shipped it to Salt Lake City, sold it there, and brought suit against Van Valkenburgh & Son for the difference between the contract price and the amount realized. He recovered judgment, from which Van Valkenburgh & Son prosecute error.

The car occasioning the controversy was loaded at Ohioa and consigned by Gregg to himself at Beaver City. The bill of lading was then sent by Gregg's agent to Gregg at Lincoln, where Gregg made a draft on Van Valkenburgh & Son, and, attaching the bill of lading thereto, sent it to Minden, where Van Valkenburgh & Son conducted their business. The right of recovery in this case depends upon whether Gregg tendered delivery of the car at the place where he had contracted to deliver it. Van Valkenburgh & Son claim that the contract was for delivery to them at Ohioa or Tobias. Gregg claims that the price was merely fixed at those points, but that he was justified in consign-

ing the corn to himself at the point designated by the vendees. In such a case there is no doubt that had Gregg consigned the car at Ohiowa to the vendees at Beaver City, this would have been a delivery at Ohiowa. On the other hand, consigned as it was, the delivery or tender of delivery was at Beaver City, and could not take place until the vendees, by payment of the draft at Minden, obtained possession of the bill of lading. (*Merchants Nat. Bank v. Bangs*, 102 Mass., 295; *Forcheimer v. Stewart*, 65 Ia., 593.) Gregg did not tender a delivery in accordance with the contract, if the contract required a delivery at Ohiowa. This we think it did. Where no place of delivery is provided, it may be inferred from the circumstances of the case, from the usages of trade or the previous course of dealing between the parties, or even from the nature of the article sold. (*Hatch v. Standard Oil Co.*, 100 U. S., 134.) But where the contract designates a place of delivery, the contract prevails; and patent ambiguities in a written contract must be solved according to the ordinary rules in such cases. If it were not for the last clause in the written contract there could be no possible doubt that the delivery was to be at Ohiowa or Tobias. It reads: "Bought * * * [on] track Ohiowa or Tobias." It is evident, however, from the last clause that the contract contemplated the shipping of the cars to some other point, and it is claimed that such other point was the point of delivery, and that the first clause only indicated that the vendee was to pay the freight from Ohiowa or Tobias to such point. But to give it such a construction does violence to the language of the contract. We think its obvious meaning is that the corn was to be bought, *i. e.*, delivered, on the tracks at Ohiowa or Tobias billed to Van Valkenburgh & Son at such point as they should designate. Their direction was "on Monday next load another large car to us at Beaver City." Gregg did not ship to them at Beaver City, but shipped to himself at Beaver City. A vendor cannot

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recover damages for the refusal of the vendee to accept unless delivery is tendered at the place required.

It is contended that the circumstances and the conduct of the parties indicate a different construction, because the other two cars were shipped in the same manner and accepted by the vendees; but although the vendees did accept the other cars, they wrote twice to the vendor complaining of the manner in which they had been shipped, on the ground that by such method the car arrived several days before the vendees could obtain possession of it through the bill of lading, and that the carrier subjected them to demurrage in consequence. The acceptance of these cars so billed waived only a departure from the contract as to these cars, and did not alter the terms of the contract for the corn not yet shipped.

It is also claimed that it was necessary for Gregg to ship in that manner in order to secure payment. The answer to this contention is that had he desired to protect himself in such manner he should have so stipulated in the contract. It is probable that, under the terms of the contract, the vendee should have been present at Ohiowa to pay for the cars, and that if Gregg had tendered the corn at Ohiowa and refused to ship until payment was made there, this would have been a sufficient compliance; but having contracted to deliver at Ohiowa, he had no right under the terms of his contract to attempt to deliver elsewhere, whatever his motive may have been.

It is argued that the vendees refused to accept solely because the price of corn had fallen at Beaver City. This is all immaterial to the case. If the vendor did not tender compliance with the contract, the motive of the vendee in refusing to accept otherwise than as provided in the contract does not affect the case.

The evidence does not sustain the verdict, and the judgment must be reversed. As the cause must be remanded for a new trial, it may be well to direct attention of coun-

sel to the fact that the construction of this contract is for the court, although there may arise questions of fact for the determination of the jury which would influence the construction. On the former trial the court gave no instruction as to the construction of the contract. In further proceedings this point should be observed.

REVERSED AND REMANDED.

STATE BANK OF O'NEILL, APPELLANT, v. W. D.
MATHEWS, IMPEADED WITH THOMSON-HOUSTON
ELECTRIC COMPANY, APPELLEE.

FILED JUNE 22, 1895. No. 6369.

1. **Deeds as Mortgages.** A deed absolute in form will be treated as a mortgage when it is given to secure payment of a debt, although the parties may have agreed that upon default of payment the deed should become absolute.
2. ———: **ASSIGNMENT OF SECURED NOTES.** A made to B his promissory notes, and to secure the payment thereof conveyed real estate to B by deed absolute in form. B sold the notes to C, and to secure them executed to C an instrument in the form of a mortgage on the land conveyed by A's deed. *Held*, That this mortgage would be treated as an assignment of the mortgage from A to B.
3. **Mortgages: ASSIGNMENT OF PART OF NOTES SECURED: FORECLOSURE: DISTRIBUTION OF PROCEEDS OF SHERIFF'S SALE.** Where a mortgage secures the payment of several notes, the assignment of one of the notes is an assignment *pro tanto* of the mortgage, and in the absence of any stipulation to the contrary, all the notes secured by the mortgage are entitled to share *pro rata* in the distribution of the fund realized from foreclosure of the mortgage.
4. ———: ———: ———: ———. The holder of several notes secured by the same mortgage transferred a portion of them to A by general indorsement, and thereafter indorsed the remaining notes without recourse to B. *Held*, That under these facts the case fell within the general rule above stated.

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5. ———: ———: ———: ———. The fact that the notes first to mature were transferred prior to the transfer of the remaining notes did not imply any agreement that those first transferred should have preference.

APPEAL from the district court of Holt county. Heard below before BARTOW, J.

H. M. Utley, for appellant.

Thomas Carlon, contra.

IRVINE, C.

One Donald McLean made and delivered to W. D. Mathews four promissory notes, each dated December 31, 1890, one for \$2,000, payable ninety days after date, one for \$1,500, payable five months after date, one for \$1,500, payable six months after date, and one for \$5,000, payable eight months after date. To secure these notes he conveyed by deed absolute in form, certain real estate to Mathews. The pleadings on both sides admit that this conveyance was made as security, and it was, therefore, a mortgage in spite of its form. A few days thereafter Mathews sold the three notes first to mature to the State Bank of O'Neill, of which Mathews was president, and at the same time executed to that bank an instrument in the form of a mortgage on the land conveyed to him by McLean. This mortgage was conditioned to secure all four notes. The three notes sold were indorsed by McLean generally. Still later McLean, in part payment of a debt to the Thomson-Houston Company, indorsed the remaining note without recourse to that company. After the maturity of the notes the bank instituted foreclosure proceedings, making the Thomson-Houston Company a party defendant. A decree of foreclosure was rendered, and the land sold, not realizing enough to pay all the notes. The decree had not fixed the order of payment, but directed the purchase money to

be brought into court. After this was done the bank applied for an order distributing the money, and giving it priority. The court refused this order, but instead thereof directed the money, after payment of costs, to be divided *pro rata* between the bank and the electric company. From this order the bank appeals.

As we have said, the conveyance from McLean to Mathews must be treated as a mortgage, and this notwithstanding the fact that McLean testifies that the agreement was that if the first note was not paid the deed should become absolute. This was the understanding and is the legal effect of all mortgages, and the whole doctrine of foreclosure and redemption arose from courts of equity relieving against this understanding and its legal effect. This deed being a mortgage, the mortgage made by Mathews to the bank must be considered merely as an assignment of the mortgage from McLean to Mathews. It therefore cuts very little figure. The mortgage is but an incident to the debt, and by an assignment of the debt the mortgage passes to the assignee. (*Webb v. Hoselton*, 4 Neb., 308.) It has also been held that where a mortgage secures several notes the assignment of one of the notes is an assignment *pro tanto* of the mortgage, and that, in the absence of any stipulation to the contrary, notes so secured share *pro rata* in the distribution of the fund. (*Studebaker v. McCargur*, 20 Neb., 500; *Harman v. Barhydt*, 20 Neb., 625; *Todd v. Cremer*, 36 Neb., 430; *Whipple v. Fowler*, 41 Neb., 675.) Without considering the correctness of this rule, it is sufficient to say that it has been for many years established in this state. It has become a rule of property, and it will not now be disturbed. Is there anything in this case to take it out of the rule?

There is some argument on either side addressed to the position of the parties as being purchasers without notice. All these considerations may be dismissed. It is true that Mathews, dealing with the bank in his individual in-

terest, did not charge the bank with notice of facts within his knowledge, and not communicated to other officers. (*Koehler v. Dodge*, 31 Neb., 328.) But the bank had notice otherwise. It appears from McLean's testimony, which is all the evidence in the case, that he had expected to sell all four notes to the bank, but the bank declined to take more than three; therefore, the bank had knowledge of the existence of the four notes, and the mortgage made by Mathews to the bank described all the notes, and in that way charged the bank with notice. (*Studebaker v. McCargur*, *supra*.) Nor can the electric company claim anything as a purchaser without notice, because it appears from the evidence that McLean informed the company, when he sold them the last note, that the other notes were secured on the same property. It is, therefore, not necessary to consider whether the situation would be different if either party took without notice of the rights of the other. The most forcible argument made on behalf of the appellant is that having indorsed the three notes generally to the bank, if McLean had retained the fourth note he could not, as against the bank, urge a right to participate *pro rata* in the proceeds of the mortgage, and that under the evidence the electric company has no equity superior to that of McLean. This argument appeals to the writer as one having in principle much force, but in *Studebaker v. McCargur* there was a general indorsement, and the court does not seem to have regarded that fact material. Moreover, the principle which would forbid McLean, had he retained the fourth note, from claiming the right to a *pro rata* distribution is based on the policy of courts of equity to avoid circuity and multiplicity of actions (*South Omaha Nat. Bank v. Wright*, 45 Neb., 23), rather than on any contractual obligation. So that the position of the electric company as transferee of the fourth note is not the same as McLean's position would be had he retained it. The electric company was not surety or indorser on the other notes.

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It is argued that the rule requiring that such notes shall prorate may be varied by special agreement, but there is in this case no evidence of any such agreement. The fact that some of the notes were transferred before the others does not imply any agreement that the notes first transferred shall have priority. This feature existed in the cases we have cited. We see nothing in the case to take it out of the general rule.

JUDGMENT AFFIRMED.

CULBERTSON IRRIGATING & WATER POWER COMPANY
v. W. D. WILDMAN.

FILED JUNE 22, 1895. No. 5859.

1. **Action to Recover Wages: PLEADING AND PROOF.** An action to recover wages under a contract for personal services can only be sustained by proof that the services were performed. Where one seeks to recover damages for breach of contract to employ he must so plead.
2. **Contract of Employment: NOVATION.** Where one enters into a contract to employ another at a fixed rate for a time certain, and afterwards disposes of the business in which the services are to be rendered to a third person, and such third person retains the servant in his employment and pays him at the contract rate for several months, this is sufficient evidence of novation to charge such third person with the obligations of the contract.
3. ———: ———: **MISJOINDER.** In such case the original employer and his vendee are not jointly liable for services performed after the novation, but if they are sued jointly and a cause of action against the vendee is pleaded and proved, he cannot be heard to object because judgment was also rendered against the vendor, nor can the misjoinder in such a case be raised by general demurrer or objection to evidence on the ground that a cause of action is not stated.
4. ———: **SUIT FOR WAGES: PLEADING.** In a suit for wages under

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a special contract, an averment that plaintiff has performed all the conditions thereof so far as defendant permitted is a sufficient averment of performance unless attacked by motion.

5. ———: ———: MEASURE OF DAMAGES. Where the wages contracted for were \$60 per month in cash and \$40 per month in water rights, the servant's measure of damages in an action for wages is \$100 per month, the value of the water rights having been fixed by the contract.

ERROR from the district court of Hitchcock county.
Tried below before WELTY, J.

House & Blackledge, for plaintiff in error.

J. W. Cole, contra.

IRVINE, C.

Wildman sued C. J. Jones, A. W. Bond, and the Culbertson Irrigating & Water Power Company, alleging that on the 12th day of August, 1890, Jones and Bond employed Wildman to work for them for the wages of \$100 per month, \$60 thereof to be paid in cash each month and \$40 to be paid in perpetual water rights, the employment to last until the completion of a certain work known as the Culbertson canal; that afterwards the Culbertson Irrigating & Water Power Company, which we shall hereafter for brevity call the company, succeeded to the rights and liabilities of Jones and Bond, and assumed and ratified the contract with plaintiff. The plaintiff further alleged that the defendants had failed to pay him his wages for the months of March and April, 1891, wherefore he asked judgment for \$200. The answer of the company was a general denial. Jones and Bond made default. A trial was had on the issues between the plaintiff and the company, and a verdict returned for the plaintiff for \$200. Judgment was entered against all the defendants for this sum. By these proceedings the company seeks a reversal of this judgment.

Some of the assignments of error are not discussed in the briefs, and will, therefore, be treated as waived. Several of the arguments advanced might properly be raised under the assignment that the verdict is not sustained by the evidence, although they are supported by additional special assignments. These we shall consider first without referring to the special assignments on which they are based.

One point made is that while the action was for wages earned there is no evidence to show that the plaintiff performed any services during the months of March and April, the period for which wages are alleged to be in default. There is evidence, however, that during the month of March plaintiff was about the office of the company ready to perform any services demanded of him, and that he in fact did during that month perform a number of services for the company and everything that he was required or requested to do. As to the month of April the case is different. The plaintiff testifies that during that month he presented his contract to the book-keeper and general manager, and told him he would expect to be paid in accordance therewith. He was informed that the company had nothing more for him to do. It also appears that during that month he was absent from the company's place of business and engaged in another town in other employment. The petition, as already stated, was for wages earned. We are aware that some old cases held that under such a count recovery could be had where a servant was wrongfully discharged before the expiration of his term of employment. This was upon the theory that the services were constructively performed, where actual performance was prevented by the wrongful act of the master. This doctrine has, however, been repudiated in England where it arose, and we think the law now is, especially under the Codes, where real and not fictitious causes of action must be pleaded, that an action for wages will only be sustained by proof that the services were performed, and where the action is for dam-

ages for breach of contract to employ the case must be so pleaded. (*Howard v. Daly*, 61 N. Y., 362; *James v. Allen County*, 44 O. St., 226.) The burden of proof was on the plaintiff to show that he performed the services in April, and as he does not fix the time of his discharge, his proof fails as to that month under the averments of his petition.

It is next argued that there was no evidence charging the company with liability. To this we cannot agree. The construction of the canal was undertaken by Jones & Bond. The contract was made with Wildman in August, 1890. In the latter part of that month the company was incorporated, and there was evidence tending to show, although not without contradiction, that the company took up the work September 1, retained Wildman in its employ and paid him each month at the rate and in the manner provided for in his contract until March 1, 1891. These facts were sufficient to establish a novation, and charge the company with the performance of the contract.

In this connection it is argued that the company could not be jointly liable with Jones and Bond; that if there was no novation it released the company. We cannot find that this objection was raised in any manner in the district court. If the petition stated a cause of action against the company and the proof established it, no question of misjoinder having been raised, the company cannot now be heard to complain of the misjoinder. Jones and Bond made default. They do not complain of the judgment against them, and the company cannot do so.

It is argued that the petition does not state a cause of action against the company, for the reason that it does not specifically allege that the plaintiff performed the services contracted for. The allegation of the petition in this respect is that plaintiff "has kept and performed all the conditions of his part of said contract, so far as he was permitted to do by the defendants." This averment might have been open to attack by motion, but we think it was a

sufficient averment of performance as against demurrer or objection on the trial to the introduction of evidence. The latter was the only method adopted to raise the question. On redirect examination the plaintiff was asked upon what consideration the contract was based. His answer was that in consideration for the employment plaintiff was to transfer certain water rights and privileges he owned. The admission of this testimony over the company's objection is assigned as error. We think the evidence was properly admitted. On cross-examination the company had shown by the plaintiff that his work had been in the office, and that during the month of March the services performed by him were not very continuous in their character, or great in amount. The fact that to obtain employment plaintiff had transferred to the company these water rights was material and proper in redirect examination for the purpose of explaining that the somewhat slight services were, perhaps, all that the contract contemplated.

On the measure of damages the court instructed the jury that if it should find for the plaintiff, he could not recover to exceed \$100 per month. It is claimed that this instruction was erroneous for the reason that the contract was that only \$60 a month should be paid in cash, and that the remainder should be in perpetual water rights, and there was no evidence as to the value of such rights. But the parties had by their contract fixed such value. It did not provide what water rights should be transferred to plaintiff, but that he was to have water rights to the value of \$40 per month. On failure to perform, the plaintiff was, therefore, clearly entitled to \$100 per month.

We find no error in the record prejudicial to the company, except that the plaintiff was allowed to recover for the month of April, while the proof did not justify such recovery. For this error the judgment must be reversed, unless the plaintiff shall, within forty days from the filing of this opinion, enter a remittitur for \$100, with interest

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at seven per cent from the 16th of September, 1892, the date of the judgment. If he do so, the judgment will be affirmed.

JUDGMENT ACCORDINGLY.

ALFRED E. HARGREAVES, APPELLEE, v. HENRY
MENKEN ET AL., APPELLANTS.

FILED JUNE 22, 1895. No. 6314.

1. **Mortgages: DURESS: DISMISSAL OF CRIMINAL PROCEEDINGS.**

A mortgage given to secure a debt will not be set aside as obtained by duress on the ground that it was given to obtain a dismissal of criminal proceedings, instituted by the creditor against the mortgagor, where the mortgage was given without threats or promises having been made to the mortgagor, and after a statement by the creditor's agent that no promise could be made, but, on the contrary, the prosecution would have to take its course.

2. **Executions: TITLE OF PURCHASER.** A purchaser at execution sale of land takes only the interest of the judgment debtor at the time the judgment became a lien on the land; and a deed or mortgage unrecorded at that time is superior to the title of such purchaser, at least if it be recorded before the sale.

3. **Mortgages: JUDGMENT AT LAW FOR DEBT: FORECLOSURE.**

Where judgment has been obtained at law on the debt secured by a mortgage, no action to foreclose can be brought until an execution has been issued on the judgment and returned unsatisfied. The return of an attachment pending the action is not sufficient.

4. ———: **FORECLOSURE: GARNISHMENT.** The pendency of proceedings against garnishees, upon a judgment for the debt, stays foreclosure.

5. ———: ———: **PROCEEDINGS AT LAW.** To prevent foreclosure it is not necessary that proceedings at law should have been instituted upon the notes secured by the mortgage. It is sufficient if the proceedings are to recover the same debt.

APPEAL from the district court of Johnson county.
Heard below before BABCOCK, J.

J. Hall Hitchcock, T. Appelget, and E. H. Wooley, for appellants.

Cornish & Lamb, contra.

IRVINE, C.,

Hargreaves began this action against Menken and wife, Herman and wife, and J. H. Shepherd to foreclose a mortgage made by the Menkens to Hargreaves to secure the payment of a note for \$316. Shepherd admitted the allegations of the petition, and by cross-petition asked a foreclosure of the same mortgage, alleging that it also secured a note of \$220 in favor of Shepherd. The Menkens answered both the petition and cross-petition, alleging that the mortgaged premises had been their homestead, and that the notes and mortgage were procured from them by duress, in that at the time Menken was wrongfully deprived of his liberty at the instance of Hargreaves and Shepherd, and that the mortgage was induced by reason of such imprisonment. Herman answered, setting up title in himself under an execution and sale of the property by virtue of certain judgments against Menken. Herman also averred that the mortgage of Hargreaves and Shepherd was withheld from record in fraud of his rights, and still further, that certain proceedings at law were pending to recover the debt secured by the mortgage. There was a decree for the plaintiff and the defendant Shepherd foreclosing the mortgage, and the Menkens and the Hermans appeal.

On the question of duress the evidence is conflicting. It appears that a firm of which Menken was a member was indebted to Hargreaves Bros., a firm of which Hargreaves was a member; that Menken's firm had made some trans-

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fer of its property, and that an attorney for Hargreaves was endeavoring to collect the debt. While these matters were in progress, Hargreaves made a complaint against Menken, charging him with obtaining goods under false pretenses. Menken was arrested and released on his own recognizance. Thereafter, and while the prosecution was pending, he and his wife executed the notes and mortgage, and soon thereafter the prosecution was dismissed, the docket showing because no one appeared for the state. Menken testifies that Hargreaves' attorney told him he would send him to the penitentiary unless he "fixed the matter up," and that if he would secure the debt he would be released. The attorney in question testified that he made no promises or threats; that Menken came to him without previous solicitation and desired to secure the debt, stating as a reason therefor that he wished Hargreaves, when secured, to proceed against other persons who Menken thought had caused him trouble, and dealt unfairly with him. The attorney also testifies that Menken asked him what would become of the prosecution, and that the attorney answered that he could make no promises, that it was a criminal case and would have to take its course. There is evidence corroborating the testimony of the attorney. If this testimony is true, then it is very clear that the mortgage was not obtained by duress. The finding of the trial court was, therefore, in this particular justified by the evidence. Nor can Herman claim anything by reason of the withholding of the mortgage from record. The mortgage was made May 9, 1890, and was recorded January 8, 1891. None of the judgments under which the land was sold became a lien thereon until September, 1890. The executions were not issued until January 20, 1891; the sale took place March 7, 1891. A purchaser at execution sale of land takes only the interest of the judgment debtor at the time the judgment became a lien on the land, and a deed or mortgage then unrecorded is to be preferred as against the

title of a purchaser at the execution sale, at least if it be recorded before the sale. (*Mansfield v. Gregory*, 8 Neb., 432, 11 Neb., 297; *Harral v. Gray*, 10 Neb., 186; *Reynolds v. Cobb*, 15 Neb., 378; *Westheimer v. Reed*, 15 Neb., 662.)

The remaining point made is that there were proceedings at law pending which constituted a defense to this action. The petition and Shepherd's cross-petition both allege that no proceedings had been instituted to recover the amount of the indebtedness. Herman's answer alleges that certain proceedings had been instituted and judgment recovered upon the debt. We will not set out this averment at length, but simply say that it was substantially according to the proof made, which disclosed that prior to the execution of the mortgage both Hargreaves Bros. and Shepherd had instituted actions at law to recover the same debts. Judgments were rendered in favor of plaintiffs in these actions in April, 1890. Certain persons were garnished, and their answers not being satisfactory, Hargreaves Bros. brought suit against the garnishees, and the latter action was pending when the suit was brought to foreclose the mortgage. Section 848 of the Code provides that "after such petition shall be filed, while the same is pending, and after a decree rendered thereon, no proceedings whatever shall be had at law for the recovery of the debt secured by the mortgage, or any part thereof, unless authorized by the court." Section 850 requires that "upon filing a petition for the foreclosure or satisfaction of a mortgage, the complainant shall state therein whether any proceedings have been had at law for the recovery of the debt secured thereby, or any part thereof, and whether such debt, or any part thereof, has been collected and paid." Section 851 provides that "if it appear that any judgment has been obtained in a suit at law for the money demanded by such petition, or any part thereof, no proceedings shall be had in such case, unless, to an execution against the property of the defendant in such judgment, the sheriff or other proper officer shall have returned that

the execution is unsatisfied in whole or in part, and that the defendant has no property whereof to satisfy such execution except the mortgaged premises." The manifest object of these provisions is to prevent the prosecution of proceedings at law to recover the debt concurrently with proceedings to foreclose the mortgage. Other provisions exist whereby in the foreclosure case personal remedies may be availed of, and the statute should be so construed as to prevent the mischief which the legislature had in view. In neither of the personal actions does the record disclose that an execution had been issued upon the judgment and returned unsatisfied. It does appear that writs of attachment were issued, but because an attachment was returned unsatisfied at the commencement of the suit, it does not follow that an execution after judgment would be ineffectual, and to show the issuing of an attachment, and its return unsatisfied, does not satisfy the requirement of section 851, that an execution must be so returned before a foreclosure case can proceed. Moreover, we think that the proceedings against the garnishees pending at the time this suit was brought were a bar to this action. The language of the Code is very general. No foreclosures can be had where any proceedings at law have been instituted until their final termination. The suit against the garnishees was an action to recover the debt secured by the mortgage, and while it was pending this suit could not be brought. Appellees seek to avoid this result on the ground that the notes to secure which the mortgage was made were executed after the judgments were recovered, and that, therefore, these judgments were not upon the debt secured by the mortgage. This argument is not sound. The notes were only evidence of the debt. It is admitted that they were given for the same debt upon which judgment was recovered, and changing the form of the debt or its evidence did not render it any less the same debt.

It is argued that Herman cannot avail himself of the

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proceedings at law against Menken to defeat foreclosure. We can see no distinction against Herman. On the other hand, if there were any distinction it would be in his favor. As between Herman and Menken, Menken was the debtor, and that would be all the more reason for requiring plaintiff to exhaust his remedy against Menken.

Because of the proceedings at law, the judgment of the district court must be reversed, and the cause dismissed, without prejudice, however, to the institution of another action in case the facts hereafter warrant.

REVERSED AND DISMISSED.

SHEDRICK C. BURLINGIM V. WILLIAM BADERS.

FILED JUNE 22, 1895. No. 5751.

1. **Instructions.** An instruction is erroneous which requires a jury to base its verdict on a matter which forms only a portion of the evidence bearing on the principal issue, and disregards the determination of that issue itself.
2. ———. Such error is not cured by other instructions stating the issue correctly.

ERROR from the district court of Seward county. Tried below before MILLER, J.

Ed P. Smith and E. C. Biggs, for plaintiff in error.

Norval Bros. & Lowley, contra.

IRVINE, C.

Mary Unsicker was the owner of a quarter section of land, and also of an eighty-acre tract in Seward county. There were upon both of these tracts incumbrances as follows:

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(1.) A mortgage from Mary Unsicker and husband to the Equitable Trust Company for \$2,500. (2.) Another mortgage between the same parties for \$250. (3.) A mortgage to Burlingim for \$1,320, which last mortgage had been assigned to Claudius Jones. In December, 1887, Baders and Mary Unsicker made a contract whereby Baders was to purchase the eighty-acre tract for \$1,650. Fifty dollars was to be paid in cash, \$1,000 to be paid in the following March. The remainder of the purchase money the parties contemplated should be raised by a mortgage to be placed on the eighty-acre tract for \$600. The eighty acres was to be relieved from the burden of the Unsicker mortgages, and for this purpose it was contemplated that the \$1,600 received from Baders should be applied toward the payment of these mortgages, and that the Unsickers should obtain a new loan on the quarter section remaining in them, wherewith to discharge the remainder of the old incumbrances. Baders paid the \$50 and the \$1,000, and executed a note and mortgage to one Upton for the \$600; but the transaction was not otherwise completed. A suit was brought to foreclose the old mortgages; they were foreclosed, and the land, including the eighty-acre tract, sold to Harry T. Jones, son of Claudius Jones. The foregoing facts are unquestioned. On every other point in the case there is a conflict. Baders brought this action against Burlingim and Harry T. Jones, charging the foregoing facts, and charging, in addition thereto, that he had paid the \$1,000 to Burlingim under an agreement on Burlingim's part that he would make the loan of \$600, and that with the money so obtained he would procure the release of the old mortgages; that Burlingim failed to perform his agreement, but instead thereof conspired with Harry T. Jones to appropriate the \$1,000, procure a foreclosure of the mortgages, and enable Jones to get the land. On the trial the court gave a peremptory instruction to find in favor of the defendant Jones, and the judgment rendered upon

this verdict is not questioned. Therefore, the charge of conspiracy is eliminated from the case, and the gist of the action is the violation by Burlingim of his agreement to procure the release of the mortgages. Burlingim in his answer denies that he ever undertook to procure the mortgages to be released, but alleges that the \$1,000 was paid to him by the Unsickers instead of the Baders, and for the sole purpose of applying the same towards the satisfaction of the mortgages, and that he had done so. The pleadings are very voluminous, and contain many facts which are evidentiary rather than final; but the foregoing summarizes the principal issues. The court gave the following instruction: "If from the testimony you should find that it was the plaintiff who gave to the defendant the \$1,000, and should you further find that the defendant afterwards paid such money with the knowledge of the mortgages existing against the premises purchased by the plaintiff from the Unsickers, it would then be his duty, with such knowledge, to retain such money and withhold payment of the same until such mortgages were released and canceled on the land purchased by the defendant from the Unsickers, and if with such knowledge if he paid such money, it would then be your duty to find for the plaintiff. However, should you find that the \$1,000 given to the defendant Burlingim was given to him by the Unsickers or either of them, it would then be your duty to find for the defendant." There was a verdict for the plaintiff, and Burlingim prosecutes error.

We think the instruction quoted was erroneous. It is true that the pleadings put in issue the fact as to whether the \$1,000 was paid to Burlingim by Unsicker or by Bader; but this was only a matter of evidence, and the verdict did not necessarily turn on that question. By the instruction as given, the jury was told that if it was the fact that the money was paid by Bader, and if Burlingim knew of the existence of the incumbrance, then the verdict must be for plaintiff. This was the effect of the instruction, because it

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was admitted that Burlingim knew that the mortgages were not released. It did not follow that because Bader paid the money to Burlingim the latter became liable. It would seem from the testimony that both Unsicker and he were present when it was turned over to Burlingim. If Bader paid it to Unsicker and Unsicker turned it over to Burlingim, this would tend to show that Burlingim's contract was not what the plaintiff claimed, but it would not finally establish that fact; nor, on the other hand, would the fact that Bader paid the money directly to Burlingim conclusively show that Burlingim agreed to see that the mortgages were released, although, in view of the other evidence, it would have a tendency in that direction. It was, therefore, erroneous to charge the jury that the verdict must turn on this fact. The real question was whether Burlingim undertook to secure the release of the mortgages, or simply undertook to apply the \$1,000 toward their payment, which there is evidence tending to show that he did. The instruction quoted entirely overlooks the real issue. There are other instructions placing this issue before the jury, but they do not cure the error in the sixth, because the latter does not merely direct attention to the facts stated as matters to be considered in determining the real issue, but requires the jury to base its verdict solely upon those facts.

REVERSED AND REMANDED.

CITY OF HASTINGS V. JEFFERSON H. FOXWORTHY.

FILED JUNE 22, 1895. No. 6152.

1. **Municipal Corporations: DAMAGES: PRESENTATION OF CLAIM: TIME: VALIDITY OF REQUIREMENT.** The provision of section 34, article 2, chapter 14, Compiled Statutes, that in order to maintain an action against a city of the second class

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having more than 5,000 inhabitants, for injury or damage to person or property, the party complaining must file a statement in the office of the city clerk, within six months from the date of the injury, giving the circumstances of such injury and other information, is a reasonable exercise of legislative power, and the filing of such a statement is a condition precedent to maintaining an action for such injury, and compliance therewith must be alleged and proved. *City of Lincoln v. Grant*, 38 Neb., 369, followed.

2. **Res Adjudicata:** REVIEW. An appellate court, on a second appeal of a case, will not ordinarily re-examine questions of law presented by the first appeal, but where the case was on the first appeal remanded generally for a new trial and the same questions are presented on the second trial, the appellate court is not bound to follow opinions on questions of law presented on the first appeal and may re-examine and reverse its rulings on such questions, and should do so when the opinion first expressed is manifestly incorrect.

3. ———: ———. *Hiatt v. Brooks*, 17 Neb., 33, modified.

4. **Action Against Cities:** LIMITATIONS: DISABILITY OF PLAINTIFF. Where a statute requires a certain thing to be done within a time specified, as a condition precedent to maintaining an action, the disability of the plaintiff during a portion of the period allowed will not extend the time of performance, provided a reasonable time remain within the period after the disability is removed.

ERROR from the district court of Kearney county. Tried below before BEALL, J.

See opinion for reference to authorities.

Tibbets, Morey & Ferris and *A. H. Bowen*, for plaintiff in error.

J. R. Webster, J. L. McPheely, and B. F. Smith, contra.

IRVINE, C.

This was an action by Foxworthy against the city of Hastings to recover for personal injuries by him sustained through falling upon a sidewalk where it was alleged the

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city had permitted ice and snow to accumulate and remain. The case has acquired a long history. In its early course the district court overruled a demurrer to one count of the answer, and a judgment of dismissal having been entered, the plaintiff brought the case to this court, where the judgment of the district court was reversed. (*Foxworthy v. City of Hastings*, 23 Neb., 772.) The case was remanded to the district court, a trial was had, resulting in a verdict for the defendant, and the case was again brought to this court and the judgment reversed for error in the instructions. (*Foxworthy v. City of Hastings*, 25 Neb., 133.) A second trial having resulted in another verdict for the defendant, Foxworthy again brought the case here, where it was for the third time reversed; this time for the insufficiency of the evidence. (*Foxworthy v. City of Hastings*, 31 Neb., 825.) After the cause had been the last time remanded, a change of venue was taken to Kearney county, where the case has been again tried, this trial resulting in a verdict and judgment for the plaintiff for \$5,000. The city now brings the case here for review. Of the errors assigned we shall notice only two, which raise the same question. These are that the court erred in overruling the objection of the defendant to the introduction of any evidence on the ground that the petition does not state a cause of action; the other that the verdict is not sustained by sufficient evidence.

The city of Hastings has been, ever since the events complained of, a city of the second class having more than 5,000 inhabitants, and section 34, article 2, chapter 14, Compiled Statutes, providing for the government of such cities, is as follows: "All claims against the city must be presented in writing, with a full account of the items, verified by the oath of the claimant, or his agent, that the same is correct, reasonable, and just, and no claim (or demand) shall be audited or allowed unless presented and verified as provided for in this section; *Provided*, No costs shall be recovered against such city in any action brought against it

for any unliquidated claim, including claims for personal injuries sustained by reason of the negligence of such city, which has not been presented to the city council to be audited; nor upon claims allowed in part, unless the recovery shall be for a greater sum than the amount allowed, with the interest thereon; *Provided further*, That all actions against such city for injury or damage to person or property hereafter sustained by reason of the negligence of such city must be brought within six months from the date of sustaining the same; and to maintain such action it shall be necessary that the party file in the office of the city clerk, within six months from the date of the injury or damage complained of, a statement giving full name and the time, place, nature, and circumstances of the injury or damage complained of, and the name or names of the witness or witnesses thereto." The case when first presented to this court called for a consideration of this section. The defendant had pleaded that the action was not brought within six months from the time when the plaintiff had sustained his injury. It was to this plea that the plaintiff demurred. This court held (23 Neb., 772) that that portion of the section we have quoted, requiring that actions shall be brought within six months, was invalid and that the general statute of limitations applied. The city's contention now is that notwithstanding that decision the last clause of the section is valid, and that no action can be maintained unless the plaintiff, within six months from the date of the injury, filed in the office of the city clerk a statement of the time, place, nature, and circumstances of the injury, and the names of the witnesses. The amended petition avers that the injury was sustained January 21, 1886, and that the statement was filed July 28, or more than six months thereafter. There are averred other facts by which it is sought to excuse the delay. This feature will be considered separately. The petition and proof both show that no statement was filed within the period required

by the statute, and it is in this respect that the city claims that the petition and proof are defective.

The first opinion in the case related solely to that portion of the section providing a special period of limitations; but in the opinion the following language was used: "Questions, no doubt, will arise as to the validity of the provision requiring notice of the names of the witnesses, etc., to be given to the city council at the time the claim for damages is filed. But that matter does not properly arise in this case. While it is proper to present the names of such witnesses to the city authorities, in order that the validity of the claim may be investigated, yet it is believed that the failure to do so will not defeat a recovery, although it may affect the question of costs." While by this language there is ventured an intimation that the action would lie notwithstanding the failure to file a statement, the court expressly states that the question was not involved in the record as then presented. Since the last hearing of the case in this court it has been decided that a provision almost identical in the charter of cities of the first class having more than 25,000 inhabitants is valid, and that the filing of the statement required is a condition precedent to maintaining the action and must be alleged and proved. (*City of Lincoln v. Grant*, 38 Neb., 369; *Dayton v. City of Lincoln*, 39 Neb., 74.) In *City of Lincoln v. Grant* there was cited on behalf of the contention that the statutory provision was not mandatory the language we have quoted from the first opinion in this case; and the court in the opinion in the *Grant* case observed that this language was a mere *dictum* and so intended. The opinion in the *Grant* case was concurred in by the author of the opinion in 23 Neb., so it is manifest that the court did not in the latter opinion undertake to decide the question. So far as any express decision or actual consideration of the question is concerned, it has never arisen in this case, and following the decision in *City of Lincoln v. Grant*, the ques-

tion must be solved in favor of the contention of the city, unless by implication it has formerly been otherwise resolved in this case, and unless, further, the court is bound by such implied decision, so far as this case is concerned, notwithstanding its deliberate judgment to the contrary in the Grant case. The defendant in error contends that there has been such an implied decision, and that this court is so bound. To this contention counsel address an argument of great technical force, supported by very respectable authority.

Referring to the decision in 23 Neb., it will be remembered that the case was there presented to reverse the overruling of a demurrer to the answer. It is a familiar rule of pleading, repeatedly enforced by this court, that a demurrer brings up for review not only the pleading demurred to, but all prior pleadings, and judgment on the demurrer must go against that party who is guilty of the first defect. (*Bennet v. Hargus*, 1 Neb., 419; *Hower v. Aultman*, 27 Neb., 251.) Regarding this rule it is, therefore, clear that the city on the first hearing could have invoked the aid of that clause of the statute we are now considering against the demurrer to its answer, and that a decision on the lines of the Grant case would have resulted in the affirmance of the judgment on the ground that the petition was defective for not pleading a compliance with the last clause of the section. It may then be fairly said that this court, by sustaining the demurrer to the answer, impliedly held that the petition did state a cause of action, and that it was, therefore, not necessary to plead, and consequently not necessary to prove, a compliance with the provision we are considering. So, again, on each of the other occasions when the case was before this court, similar considerations would have led to the affirmance of the judgments in favor of the city on the ground that notwithstanding any of the errors which in fact led to a reversal, the judgment was the only one which could have been ren-

dered under the pleadings and proof. We think, therefore, that the defendant in error has quite clearly established the proposition that the question under consideration, had it been presented, would have controlled any of the former decisions; and that the court may be said to have already three times impliedly decided the question now before us in favor of Foxworthy, although on no occasion was that question in fact considered or actually decided.

The argument having advanced thus far, the defendant in error invokes the application of a rule which has been frequently announced by appellate courts, that a ruling once made in a case by an appellate court, while it may be overruled in other cases, is binding both upon the inferior court and upon the appellate court itself in all subsequent proceedings in the original case, and that in such subsequent proceedings neither the lower court nor the court making the ruling can depart from such ruling. A ruling so made is said to become "the law of the case." As a preliminary to the discussion of the application of the rule to this case, it may be well to review the former decisions of this court and ascertain to what extent it has committed itself to the doctrine contended for.

In *Hiatt v. Brooks*, 17 Neb., 33, the court stated the rule in the syllabus as follows: "A previous ruling by the appellate court upon a point distinctly made may be only authority in other cases to be followed or affirmed, or to be modified or overruled, according to its intrinsic merits, but in the case in which it is made it is more than authority; it is a final adjudication, from the consequence of which the court cannot depart nor the parties relieve themselves." The opinion contains no discussion of the rule, but only a statement that the court would adhere to the views expressed in the former opinion, followed by the statement that it would be inadmissible to review the grounds of such opinion, now that the trial court has obeyed the order before made with the result logically following. No authori-

ties are cited in the opinion, but the statement of the rule in the syllabus is followed by a citation of "*Phelan v. San Francisco*, 20 Cal., 45, quoted in Wells' *Res Adjudicata*." From this method of citation it would seem probable that the court had not consulted the decision cited, but only the text-book; and from the summary method in which the opinion disposed of the question, it is evident that it was not one considered very important to the disposition of the case.

In *O'Donohue v. Hendrix*, 17 Neb., 287, the case had already been before the court, and this language was used in the opinion: "The first and third objections were considered on the former hearing, and decided against the plaintiff. No motion for a rehearing was filed nor was any objection made to the decision of the court. Those questions, therefore, will not be again considered. (*Hiatt v. Brooks*, 17 Neb., 33.)"

In *Leighton v. Stuart*, 19 Neb., 546, a quotation is made from the former opinion in the same case, followed by this language: "In *Hiatt v. Brooks*, 17 Neb., 33, it was held, and I think correctly, that," etc., (quoting the syllabus in *Hiatt v. Brooks*). The court then adds that there is no doubt, independent of this principle, that the conclusions of law already arrived at were correct. The rule in *Hiatt v. Brooks* was invoked in support of the decision of questions of fact in *Lane v. Starkey*, 20 Neb., 586, and the court there held that the rule must be applied only to the decision of legal principles, but that it did not require the following of former decisions on questions of fact.

In *Marion v. State*, 20 Neb., 233, there is no reference to the doctrine in the syllabus, but certain conclusions reached on a former appeal of the case were adhered to, the following being the only reference to the subject in the opinion: "We adhere to our former holdings upon this part of the case, both upon the ground that we believe them to be correct and for the further reason that having

been so decided in this case on its previous hearing, *Marion v. State, supra*, it has become the law of the case." (Citing *Hiatt v. Brooks* and *Leighton v. Stuart*.)

In *Chicago, B. & Q. R. Co. v. Hull*, 24 Neb., 740, the language of the syllabus in *Hiatt v. Brooks* is requoted in the syllabus. In the opinion the following is the only language addressed to the subject: "This point was distinctly presented in this case when it was first before this court, and distinctly decided. Under the well known rule of *stare decisis*, that decision remains the law of this case." It may be here remarked that in *Hiatt v. Brooks* the court refers the rule to the principle of *res adjudicata*, while in *Chicago, B. & Q. R. Co. v. Hull* it is referred to the doctrine of *stare decisis*.

In *Meyer v. Shamp*, 26 Neb., 729, the rule is stated in the syllabus as follows: "A judgment or ruling of this court in a case or point distinctly and finally made, will be held to be the law of the case in which made, throughout its course of litigation, without regard to the number of times it may be brought before the court, or to the intrinsic merits of such judgment or ruling." The court refers to *Hiatt v. Brooks* and several of the cases we have already cited, and says that the rule there stated "is believed to be the law."

The foregoing comprises, we believe, all that has ever been said by this court on the subject. Of these decisions, we have the following observations to make: In the first place, in each case, either by the language employed or by the adoption by citation of the language in *Hiatt v. Brooks*, the rule was limited to rulings formerly made on points distinctly presented for decision. Inasmuch as the plaintiff in error here, as we have seen, can invoke only an implied decision and not one on any point distinctly made on the former hearings, we do not think that any of the cases cited, by its terms, controls this case. A further observation is that notwithstanding the repeated statements of the

rule, there has never been in any case a discussion of its correctness, or a reason advanced for its application. In the third place, it twice at least appears from the opinions that notwithstanding the rule the court had reconsidered the questions presented by the former appeal, and believed the former ruling to be correct, and in no case has any doubt been expressed as to the correctness of the former decision. In other words, the court has never yet been confronted with the problem which we are now facing, that of overruling a former decision in the same case, or else abiding by it because of the doctrine stated, although such former ruling was manifestly wrong and opposed to the later decisions of the court. Had the court on former occasions entertained any doubt of the correctness of the ruling on the first appeal, it can hardly be that such doubt would have been thrust aside without a consideration of the reason for the rule requiring it to be thrust aside, and the statement of some reason in support of such rule. In a sense, therefore, all the statements which we have quoted may be said to be *obiter*, and we feel not only at liberty, but required, now when the application of the rule for the first time would demand adherence to a decision manifestly wrong, to carefully examine the subject, even though such examination may lead to a modification of a rule of practice which has obtained for many years. In this discussion, before examining the question upon principle, we shall endeavor to examine it in the light of the authorities and ascertain how the doctrine arose and to what extent it has received the support of other courts. In *Hiatt v. Brooks* it was expressly adopted from *Phelan v. San Francisco*, 20 Cal., 45, and in all subsequent cases it has been based solely upon the authority of *Hiatt v. Brooks*. It may be said, then, that we have adopted the doctrine from California, and we shall look first at the decisions of that state.

The case in which we first find the rule announced in

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California is that of *Dewey v. Gray*, 2 Cal., 374. It would seem from the report that the case had once before been before the supreme court, but we have been unable to find the first decision reported. The action was one for rent, to which it was pleaded that the landlord had re-entered before the expiration of the lease and relet the premises to another. The court says that it before held that the re-entry and reletting discharged the tenant from his covenant, with the exception that the landlord was still entitled to recover any rent which had accrued at the time of the re-entry. Then follows this remarkable language: "The latter portion of that decision is in abrogation of one of the plainest principles of law, and if this case was a new one I would not hesitate to overrule it; but legal rules deprive us of the power to do so. The decision having been made in this case it has become the law of the case, and is not now the subject of revision." The sole authority cited in support of this radical statement is *Washington Bridge Co. v. Stewart*, 3 How. [U. S.], 413, a case which we shall show hereafter is not in point, and depends upon entirely different principles, which the California court, as well as others, seems to have overlooked. Hardly less remarkable than the language here used is the fact that it was manifestly *obiter*. The jury had found a verdict for the plaintiff for the full amount of the rent claimed. Under the instructions this involved a finding that there had been no re-entry, so it was entirely immaterial to the decision of the case whether in case of a re-entry recovery could be had for rent accrued to that time. But behold to what length a too rigid adherence to the doctrine of *stare decisis* may lead us.

In *Clary v. Hoagland*, 6 Cal., 685, the action was one of forcible entry, and had begun in the county court where judgment had gone in favor of the plaintiff. The supreme court reversed the judgment and remanded the cause for a new trial. The case was again presented to the supreme

court on *certiorari* to review proceedings wherein the county court had by *mandamus* commanded its clerk to issue a writ on the original judgment. A motion to dismiss the writ was denied, and a rehearing was allowed on the question as to whether the former judgment was conclusive on the parties, the supreme court having in the meantime determined that in such case the district court had no appellate jurisdiction, and the case having been first brought to the supreme court through the district court by an attempted appeal. Here, it will be observed, the court was called upon to say whether or not in subsequent proceedings in a case the parties and the court were bound by a decision announced in an appeal over which the supreme court had no jurisdiction. The court again cited *Washington Bridge Co. v. Stewart*, and carried the doctrine of *Dewey v. Gray* to its logical conclusion, holding that although it had no jurisdiction in such cases, still, having in this particular case entertained jurisdiction, the parties were bound by the result. Not only this, the question of jurisdiction was not raised on the former hearing, but the court said that it must always be implied that a court at the very first decides the question of its jurisdiction, and having entertained the case on its merits, the question of jurisdiction must be considered as having been decided, although not in fact raised or considered.

In *Davidson v. Dallas*, 15 Cal., 75, the doctrine was again stated very nearly in the language in which it appears in some of the Nebraska cases. *Dewey v. Gray* is quoted at length, and, in addition thereto, there are cited *Washington Bridge Co. v. Stewart* and several other cases in the supreme court of the United States; also, *Hosack v. Rogers*, 25 Wend. [N. Y.], 313; *Stiver v. Stiver*, 3 O., 18; *Booth v. Commonwealth*, 7 Met. [Mass.], 286, and *Russell v. La Roque*, 13 Ala., 151. Only one of these cases, we shall undertake to show, was in point. The case we are considering is, however, noteworthy as being one of a very

few cases in which the court has attempted to give a reason for such a rule of law; and the reason given is that after a mandate the appellate court loses jurisdiction over the case, and that questions decided leading to the judgment and mandate constitute a final adjudication. This reasoning is undoubtedly sound as applied to a certain class of mandates, as is illustrated in a class of cases which the California court has considered as supporting its doctrine; but we cannot see how it is applicable to a mandate reversing a case and remanding it for a new trial. In the latter case the whole case is tried anew, and nothing is settled by the first appeal beyond the fact that the first trial was erroneous, and that all the issues must be tried again.

The case of *Phelan v. San Francisco*, 20 Cal., 39, being the only case which our court has cited in support of the doctrine, states it in the language of the syllabus in *Hiatt v. Brooks*, citing *Davidson v. Dallas*; but there is no discussion of the doctrine. In the same volume, however, appears the case of *Leese v. Clark*, 20 Cal., 388, where Judge Field delivered the opinion of the court and again stated the doctrine. He says that the court entertained no doubt of the correctness of the former decision, then cites *Dewey v. Gray* and the other California cases, and three of the cases cited in *Davidson v. Dallas*. The reason is stated to be that the court by its mandate abandoned jurisdiction of the first appeal, and lost the power to modify its judgment therein expressed.

A number of California cases later than the 20th might be cited supporting the contention of Foxworthy. It will not be necessary to review them. It is sufficient to say that the California court has, by repeated decisions, adhered to that doctrine, and that all these cases fairly support Foxworthy's contention. Inasmuch as our cases, if adhered to, based as they are on the authority of California, would require a decision here in favor of Foxworthy, we have reviewed the cases down to the 20th, at which point

our court adopted their doctrine, for the purpose of showing that they originated in California in an *obiter dictum*, and that California traces the doctrine to certain cases in the supreme court of the United States and elsewhere, which do not support the doctrine; and for the further reason of showing that the California court has given a reason for its decisions applicable to those cases which it cites and furnishing a sufficient ground for those decisions, but which does not in any way apply to the cases decided in California or to such a case as the one now before us.

The California doctrine is not without support in the decisions of some other states.

In *Russell v. La Roque*, 13 Ala., 149, the opinion opens as follows: "This cause has been tried before this court, and the rules applied to it then is the law of it now." In better English, but just as bluntly, the same court said in *Thomason v. Dill*, 34 Ala., 175, that propositions laid down on a former appeal "are the law of this case and must not be lost sight of." In neither case was any doubt expressed as to the correctness of the former decision, and there is no discussion of the rule announced.

In *Rector v. Danley*, 14 Ark., 304, the opinion opens with a statement that it is a settled doctrine that a decision made when the cause was in the court before is the law of the case, and nothing then determined can be reviewed. Here, again, no authority is cited and no reason is given.

Precisely of the same nature is the case of *Mynning v. Detroit, L. & N. R. Co.*, 35 N. E. Rep. [Mich.], 811. The doctrine has also been adopted in Indiana, the rule being stated there also unaided by argument or authority. (*Kress v. State*, 65 Ind., 106; *Pittsburg, C. & St. L. R. Co. v. Hixon*, 110 Ind., 225; *Continental Life Ins. Co. v. Houser*, 111 Ind., 266.)

The doctrine also receives apparent support in the cases of *Hill v. Hoover*, 9 Wis., 12, and *Pierce v. Kneeland*, 9 Wis., 19; although both of those cases might have been solved

under a strict and correct application of the doctrine of *res adjudicata*. Of the same character is the case of *Hopkins v. Hopkins*, 40 Wis., 462. In none of these cases was the first reversal general, but the cause was remanded with certain features finally adjudicated, so that they could not again properly arise in the further proceedings in the case.

In *Stacey v. Vermont Central R. Co.*, 32 Vt., 551, the court, while intimating some doubt as to the correctness of the doctrine, states that it has been so long established that it will not be departed from, but also states the reason for it to be, in the first place, that the former decision has the same weight as authority as a decision in another case, and, in the second place, that it is an adjudication between the parties. The latter reason is the only one which could be advanced for holding the decision conclusive upon the court, and the Vermont court says that it is not conclusive as a matter of law, because the court may revise and reverse it. Thus, this case is, after all, ambiguous, leaving the former decision in scarcely any stronger position than a decision of the same question between other parties.

In *Semple v. Anderson*, 4 Gil., 546, the rule seems to be for the first time in Illinois announced, and the court cites in support of its conclusion the cases in the supreme court of the United States cited by the California court, and 7 Met. [Mass.], 286. As we have already stated, we shall show that these cases are based upon a different principle, which is illustrated by the case of *Hollowbush v. McConnel*, 12 Ill., 203. In that case the opinion was by Judge Trumbull. On the former appeal the cause had been remanded for certain specified proceedings, not remanded for new trial generally. In the inferior court an effort was made to relitigate the questions which had been finally determined by the first appeal, and which were not within the scope of the mandate. The court properly held that these issues were *res adjudicata*, citing *Washington Bridge Co. v. Stewart*, 3

How. [U. S.], 413, which is in point on this proposition. Unfortunately, however, in *Cook v. Norton*, 61 Ill., 285, the court, on the sole authority of *Hollowbush v. McConnell*, applied the doctrine to a case remanded generally for a new trial, losing sight of the distinction between a final order adjudicating an issue and an order remanding a case for a new trial throughout, leaving all issues still undetermined. Later Illinois cases have followed the doctrine of *Cook v. Norton*, the question not seeming to have ever again been examined on its merits.

We have now referred to the decisions of all states which in our opinion lend either actual or apparent support to the doctrine of the California court. We have seen that in every case the rule first originated in a bald *dictum* without the support of reason or argument, or else it was based on the authority of certain cases in the supreme court of the United States, or of New York, Massachusetts, and Ohio. The New York case cited is *Hosack v. Rogers*, 25 Wend., 313. This was a case before the court for the correction of errors. A doctrine somewhat akin to that here contended for is stated in the syllabus prepared by the reporter. There is only one opinion supporting that view, three adverse thereto. The vote of the court was eleven to eight for affirmance, and it nowhere appears that that vote was because a majority of the court agreed with the one member who advanced the "law of the case" doctrine, except by a note of the reporter to the effect that it was "generally understood" that but for the principle of *stare decisis* the judgment would have been reversed. The case of *Booth v. Commonwealth*, 7 Met. [Mass.], 285, often cited in support of the doctrine, was where a judgment had been affirmed and the plaintiff in error undertook to sue out a second writ of error from the same judgment. The court, of course, held that this could not be done, but we cannot see how by any stretch of the imagination the rule here contended for can be discovered as involved in that ques-

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tion. The case of *Stiver v. Stiver*, 3 O., 19, is also cited; but that case merely held that a bill in chancery would not lie to correct a judicial error. *Pollock v. Cohen*, 32 O. St., 514, was precisely like *Booth v. Commonwealth*. The cases most frequently cited as supporting the doctrine are, however, those in the supreme court of the United States, and we shall now proceed to their examination.

The first case in point of time is *Himely v. Rose*, 5 Cranch [U. S.], 313. This was an admiralty case. There had been an appeal in which the sentence was reversed with a direction as to what the sentence should be, and an order remanding the case for the entry of a sentence in accordance with the opinion. For the purpose of entering such a sentence the circuit court referred the case to auditors, and there was an appeal from the auditors' report. In arguing this appeal, Mr. Martin was about to open a question covered by the first appeal, when Chief Justice Marshall remarked: "Nothing is before this court but what is subsequent to the mandate." It will be observed that the chief justice in effect stated that everything prior to the mandate had been adjudicated, and this was undoubtedly correct. The mandate did not send the case back for a new trial, or for a new hearing, but with specific instructions as to further proceedings. The propriety of such further proceedings was, therefore, finally adjudicated and not involved in the second appeal.

In *Skillern v. May*, 6 Cranch [U. S.], 267, a cause had come to the supreme court from the circuit court for the district of Kentucky. The decree of that court had been reversed with directions to make partition. When the cause came up before the circuit court upon the mandate, it was discovered that the jurisdiction of the circuit court was not pleaded and the case again came to the supreme court on a certificate of division as to whether the circuit court should then dismiss the cause for want of jurisdiction. The supreme court wrote no opinion, but merely entered an

order that it was the duty of the circuit court to obey the mandate. This case certainly involved no question of the power of the supreme court to change its conclusion. It merely repeated to the circuit court what the mandate had already directed.

The next case is the famous case of *Martin v. Hunter*, 1 Wheat., 304. The case had been brought to the supreme court of the United States on a writ of error to the court of appeals of Virginia. The supreme court had reversed the case and remanded it to the court of appeals, which refused to execute the mandate on the ground that the supreme court of the United States had no jurisdiction. A writ of error was then taken to review the refusal of the court of appeals to obey the mandate, and it was argued that if the supreme court had no jurisdiction of the first writ, all subsequent proceedings were void. To this the supreme court answered that the former record was not before it, and that the second writ of error did not draw in question the propriety of the first judgment. In *Hunter v. Martin*, 4 Munf. [Va.], 1, the first mandate is set out at length, from which it appears that the supreme court remanded the case with directions to the court of appeals to enter a judgment for Martin. It will be observed that the first judgment of the supreme court was a final one upon the merits, constituting an adjudication of title. The cause was not remanded for a new trial, and no question had been left open.

In the case of *The "Santa Maria,"* 10 Wheat. [U. S.], 431, the supreme court on the first appeal had entered a decree and issued a mandate to carry that decree into effect. Pending the appeal a claim had been interposed for insurance and other charges on the boat. On the second appeal this claim was resisted, on the ground that the petitioner was a *mala fide* claimant. The court remarked that no question could be raised which had been before the court on the first appeal, but that all new questions were opened

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for determination and the whole record before the court for that purpose. This was another case of final adjudication by the first appeal. The matters there involved had not been reopened for a new hearing. *Sibbald v. United States*, 12 Pet. [U. S.], 488, was a similar case.

The case most frequently cited by the courts which have adopted the doctrine contended for by Foxworthy is *Washington Bridge Co. v. Stewart*, 3 How. [U. S.], 413. In that case an assessment had been made on the stockholders of the bridge company. Stewart and others who were stockholders did not pay, and the company undertook to forfeit their stock. Congress passed an act to purchase the bridge, whereupon these stockholders filed a bill in the circuit court for participation in the purchase money. The court entered a decree holding that the plaintiffs were still stockholders, but that before division of the purchase money certain other stockholders should be reimbursed from that fund for advances which they had made. The decree also ordered a reference to an auditor to state an account in accordance with the decree. An appeal was immediately taken from this decree and the decree affirmed by the supreme court. The auditor then proceeded to state the account, after which a final decree was entered. An appeal was taken from this decree by the bridge company, which had also been the appellant before. The company undertook to question the propriety of the first decree on the ground that it was interlocutory merely, and therefore not appealable, and that the bridge company was not estopped by the decision on the first appeal. The supreme court held that the bridge company having appealed from the interlocutory decree and no exception having been taken to the jurisdiction, and the case having been decided on its merits, the parties were now estopped from alleging the want of jurisdiction, and that the first decree affirming the interlocutory decree of the circuit court constituted an adjudication of all matters therein involved. This case was

like all the others. The refusal of the court on the second appeal to reconsider the questions was based not on any want of power to do so after a new trial in the same case of the same issues, but was based on the fact that the first appeal had led to a judgment in the supreme court, finally adjudicating the issues, and leaving none of those already disposed of to be retried after the mandate.

The foregoing are the cases usually cited by the advocates of the California rule. Many others of like character in the supreme court of the United States might be cited, but that court has never laid down the California rule and has never decided a case which lends any support to it. We need not review the decisions of the courts of the other states. We have examined very many of them. We find many cases like those in the supreme court of the United States, and, indeed, this court has applied the principle therein involved. (*Younkin v. Younkin*, 44 Neb., 729.) On the other hand, many courts have, without question, on a second appeal after a mandate reversing a case for a new trial, reconsidered questions presented on the second trial which had also been presented on the first. The distinction which we have endeavored to point out, a distinction ruling the decisions of the supreme court of the United States, and one which the California court failed to observe, was distinctly recognized in *Adams County v. Burlington & M. R. R. Co.*, 55 Ia., 94. It was there urged that a decision did not become *res adjudicata* so long as the case remained pending. The court said: "Whatever force there might be in this position in an action at law where the right to introduce new evidence after verdict involves the retrial of the whole case, we think it cannot be maintained in a case like this." On a rehearing the same result was reached upon the ground that when the cause was first reversed it was remanded for a single purpose; for all other purposes there was held to have been an adjudication. In *Davis v. Curtis*, 70 Ia., 398, general language was used

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V to the effect that a ruling once made became the law of the case. *Adams County v. Burlington & M. R. R. Co.* was the only authority cited, and *Davis v. Curtis* was a case like that, the first appeal having determined the rights sought to be relitigated. On this branch of the case we shall refer to only three other authorities; these are *Bane v. Wick*, 6 O. St., 13, *Bell v. Lamprey*, 58 N. H., 124, and *Frankland v. Cassaday*, 62 Tex., 418. The doctrine of these cases is that conclusions reached on questions of law on the first appeal will ordinarily not be examined on a second appeal, but that in exceptional cases, when the court is very clearly satisfied that its former opinion was erroneous, this rule will not be applied.

In the discussion of the authorities we have gone far beyond the proper limits of most opinions. We have done so because we deem the question one of very great importance, and have felt the necessity of a close examination both upon principle and upon authority. The general course of the review has been to trace the doctrine back. Adopting now the contrary course, it will be observed that its history is this: The supreme court of the United States and other courts having once entered judgments or decrees finally adjudicating certain issues, decided very properly that on a second appeal nothing so adjudicated could be relitigated. Other courts declined to permit a party after an unsuccessful appeal to prosecute a second appeal from the same judgment. A few courts, notably California, failing to draw the distinction between a judgment upon the merits and a *venire de novo*, adopted these cases as authority for the proposition that where a new trial had been awarded the court could not on a second appeal re-examine any questions of law decided on the first. Having gone so far they were driven to the further conclusion that the principle applies to every question involved in the first appeal whether in fact examined or not. Then in a very few instances after this doctrine had been established, but never

in a case of first impression, some reasons have been given in its support. That usually given is that the first opinion is an adjudication. It needs but a moment's reflection to show that there is no adjudication by the expression of an opinion on a point of law where no judgment is entered in accordance with that opinion but the cause is remanded generally. The only thing adjudicated is that there was error in the record, and that the whole case should be re-litigated. To apply the rules of *res adjudicata* to such a case would require a further holding that where a court has overruled a demurrer it may not afterwards on the trial dismiss the case because no cause of action is stated, or, having granted a temporary injunction, that it may not dissolve that injunction if it becomes satisfied that it was improvidently granted. Another reason given is that there must be an end to litigation. This is a salutary maxim, but to say that a court may not correct its own mistakes for this reason is to push it to an absurd conclusion. A third reason, somewhere given, is that on a second appeal the court only reviews the record for error on the second trial; that it is the duty of the trial judge to follow the opinion of the appellate court, although he may think it is erroneous, and technically he never errs when he does so. It is true that it is the duty of the trial judge to follow the directions of the appellate court, but when the case comes again before the appellate court, the question is not did the trial judge proceed according to its former opinion, but were his rulings correct in law. To enforce erroneous rulings, simply because the appellate court had directed the error, would be to pervert the law and sacrifice justice to the technicalities of practice. That the rule is not well founded in principle may be seen by the confusion of the courts in their efforts to base it upon a known principle. Some courts trace it to the principle of *res adjudicata*, some to that of *stare decisis*, and some, evidently realizing that it falls within neither principle, fall back upon the indefi-

nite term "the law of the case," as if it were possible under our system of jurisprudence that there should be one law for one case and a different law for other cases entirely similar thereto. It has never been doubted that an appellate court is not bound blindly to follow precedent. A rule of law once announced affords a guide for similar cases, and will ordinarily control their decision; but having announced a rule, when another case arises presenting the same question, if the court is satisfied that its former opinion was wrong, it may, and frequently does, overrule it. The limitations resting upon courts in this respect are usually stated to be, first, that a former decision will not be overruled when it has become a rule of property; and secondly, that it will be followed although erroneous, where more mischief will result from overruling than from following it. This is as far as the doctrine of *stare decisis* should go. When, however, a decision in one case is overruled in another, there is no remedy for the defeated party in the first case. His rights have been determined, and a decision overruling a former opinion in a different case amounts always to an admission by the court that it has subjected the unsuccessful party in the first case to an injustice which can never be remedied. Notwithstanding this, subject to the limitations we have stated, courts do overrule such opinions. Why should the rule be more stringent when the same case is up for review, the erroneous judgment still unexecuted, the parties before the court, and the case in such a situation that by the correction of the error no injustice will be done, beyond, perhaps, the creation of additional costs? If the doctrine contended for is to prevail here, then it follows that the only instance in which the court is not permitted to correct its mistakes, or refuses to do so, is also the only instance where the mistake can be corrected without injustice. Take the case before us. The court in the Grant case decided in effect that its former decisions in this case should have been in favor of the city instead of Fox-

worthy. In subsequent cases, by reason of the decision in the Grant case, the city would prevail under the same state of facts; but if the former decisions in this case are conclusive upon the court the rule will be different for the city of Hastings and for Mr. Foxworthy in this one case than it is for all others and in other cases; and if so, what is to be done with that part of the fourteenth amendment to the federal constitution which forbids any state to deny to any person the equal protection of the laws? A court has no legislative power. Its duty is to declare what the law is, not to make law. To hold that it is bound to follow in a given case an erroneous decision formerly rendered in the same case would be to hold that, although the court believes the law to be otherwise, it will make a special law for the particular parties and the particular case before it, contrary to the general law—to substitute what it is pleased to call “the law of the case” for the law of the land, for the law which every member of the court is sworn to administer. To do so it must not only legislate, but legislate specially in a manner which our constitution forbids to the legislative body itself.

We conclude that the principles governing the case are these: The cause having been remanded generally, there was no adjudication of any rights between the parties; that the record presents the question upon this trial as well as upon the others, and that it is within the power of the court to re-examine its former decisions and apply the law correctly. We think that ordinarily the court is justified in refusing to re-examine questions of law once passed upon, and that it is only where it clearly appears that the former decision was erroneous that this should be done. It is, however, now clearly established that the former opinions in this case were erroneous and the court should correct the error. In the amended petition the averment appears that the plaintiff was confined to his bed and house for more than ten weeks, and was wholly incapacitated,

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mentally and physically, to do any business or transact any affairs until the first day of May thereafter. On the trial a witness testified that for six or eight weeks Mr. Foxworthy suffered intense pain, and that for a month or six weeks he was insane through pain. It will be remembered that the injury was sustained January 21 and the statement was filed with the city council July 28. Do the facts so pleaded and proved excuse the delay? We think not. The filing of the statement was a condition precedent to the maintenance of the action. It was not in the nature of a limitation, and the existence of a disability preventing plaintiff from filing a claim would not extend the time for filing it for the statutory period after the disability was removed. We think the uniform line of authority on this subject is that the condition must still be performed within the time specified, provided a reasonable time after the removal of the disabilities remain for that purpose. It has been so held even in the case of a limitation by contract. (*Steel v. Phenix Ins. Co.*, 47 Fed. Rep., 863; *Blanks v. Hibernia Ins. Co.*, 36 La. Ann., 599.) Giving the utmost possible effect to the pleadings and evidence in regard to Mr. Foxworthy's disability, there remained after its removal several months within which the statement might have been filed.

REVERSED AND REMANDED.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF NEBRASKA.

SEPTEMBER TERM, A. D. 1895.

PRESENT:

HON. T. L. NORVAL, CHIEF JUSTICE.

HON. A. M. POST,
HON. T. O. C. HARRISON, } JUDGES.

HON. ROBERT RYAN,
HON. JOHN M. RAGAN, } COMMISSIONERS.
HON. FRANK IRVINE, }

CHRIST MULLER V. G. W. PLUE ET AL.

FILED SEPTEMBER 17, 1895. No. 6011.

1. **Justice of the Peace: SERVICE OF SUMMONS: JUDGMENT.** In an action before a justice of the peace, where the defendant does not appear, the record must show that legal service of the summons was made, or the judgment will be void.
2. ———: **SUMMONS: DOCKET ENTRY.** A justice of the peace must enter upon his docket the day and hour fixed in the summons for the time of trial, and the omission to do so is fatal, where there is no appearance of the defendant.
3. ———: ———: **APPEARANCE OF PLAINTIFF.** Where the defendant fails to appear, the record must disclose that the plaintiff

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appeared within one hour of the time named in the summons for appearance, or jurisdiction is lost.

4. **Replevin: LIEN OF EXECUTION ON VOID JUDGMENT.** In an action of replevin, where the defendant claims to hold the property by virtue of the levy of an execution regular on its face, the writ and levy thereunder will confer upon the officer no right to hold the property as against the owner, if the execution was issued upon a void judgment.
5. —: —. The second point of the syllabus in *Wilson v. Macklin*, 7 Neb., 50, overruled.

ERROR from the district court of Lincoln county. Tried below before NEVILLE, J.

The opinion contains a statement of the case.

Grimes & Wilcox, for plaintiff in error :

The record was insufficient to show a judgment. (*Gapen v. Bretternitz*, 31 Neb., 304; *Miller v. Burlington & M. R. R. Co.*, 7 Neb., 227.)

In cases before inferior courts the record must show that the court had jurisdiction. (*State v. Berry*, 12 Ia., 60; *Goodrich v. Brown*, 30 Ia., 291; *McCurdy v. Baughman*, 1 N. E. Rep. [O.], 93; *Hargis v. Morse*, 7 Kan., 415.)

Where defendant does not appear the record must show a legal service, or the judgment will be void. (*Repine v. McPherson*, 2 Kan., 340.)

Where there is no appearance of defendant the docket of a justice of the peace must affirmatively show that plaintiff appeared within one hour of the time named in the summons, or jurisdiction is lost. (*Mudge v. Yaples*, 25 N. W. Rep. [Mich.], 297; *Post v. Harper*, 28 N. W. Rep. [Mich.], 161.)

An officer claiming title to property under a process in his hands must show a valid unpaid judgment. (*Wells, Replevin*, sec. 30; *Beach v. Botsford*, 1 Doug. [Mich.], 199; *Adams v. Hubbard*, 30 Mich., 104.)

An execution regular on its face may protect an officer

against personal responsibility in serving it, but when he claims property under it he must show it was issued on a valid judgment. (*Gidday v. Witherspoon*, 35 Mich., 368.)

T. Fulton Gantt and James M. Ray, contra:

When jurisdiction appears, all matters relating to the form of procedure in justice courts should be construed with great liberality. (*Crook v. Hester*, 21 Neb., 369; *Degering v. Flick*, 14 Neb., 449; *Rawalt v. Brewer*, 16 Neb., 444.)

The judgment of a justice of the peace is as absolute between the parties as the judgment of the highest court and cannot be attacked collaterally. (*Hilton v. Bachman*, 24 Neb., 492; *Roberts v. Flanagan*, 21 Neb., 503; *Oakley v. Pegler*, 30 Neb., 628; *State v. Buffalo County*, 6 Neb., 454.)

Every presumption is in favor of the correctness of a judgment until the contrary affirmatively appears. (*Credit Foncier v. Rogers*, 10 Neb., 184; *Thesing v. School District*, 16 Neb., 134; *Hilton v. Bachman*, 24 Neb., 492.)

NORVAL, C. J.

This was a suit in replevin brought by the plaintiff in error in the county court of Lincoln county for the recovery of the possession of six head of cattle. From a judgment in favor of the defendants the plaintiff prosecuted an appeal to the district court, where, upon a trial to the court, judgment again went against him.

A reversal is sought on the ground that the findings and judgment are contrary to law and the evidence in the case. There is no controversy as to the facts. It was stipulated upon the trial that at the commencement of the action plaintiff was the owner of the cattle in dispute; that they were taken from his possession by the defendant M. L. Artlip by virtue of an execution issued by J. E. Cussins, a justice of the peace of Somerset precinct in said county, in a suit wherein the defendant in error herein, G. W. Plue,

was plaintiff and Christ Muller was defendant; that a demand for a return of property was made by plaintiff prior to the commencement of this suit. It is contended that the execution, under which the defendants attempted to justify, was not issued upon a valid judgment. The following is the record made by Justice Cussins, as appears by the docket introduced in evidence on the trial:

"Transcript of proceedings had before me, a justice of the peace of — precinct, —, in Lincoln county, in the state of Nebraska, in an action wherein — was plaintiff, and — bill of particulars — was defendant.

"The plaintiff says there is due him from the defendant the sum of \$37 for trespass and damage done by his stock on his farm. Summons issued April 27, 1891. Summons returned May 2, 1891. Case was called. Plaintiff appeared. Defendant did not appear. Witnesses, Alex. Green, G. W. Moore, Charles McDonal, H. C. Lord, D. McGahey, Ed. Changnon, and Mel Young.

"By request of G. W. Plue, plaintiff, judgment rendered on default May 2, 1891, for the plaintiff for the sum of \$19 and all costs.

"May 18, 1891, execution issued and delivered to M. L. Artlip, special constable."

It will be observed that the docket of the justice fails to disclose the day and hour specified in the summons for the appearance of the defendant, nor does it appear that service of the writ was ever had upon him, nor, if made, that it was served at least three days before the time set for trial as required by statute. It is shown that Muller never appeared before the justice. Therefore it was necessary for the docket to show affirmatively that jurisdiction was acquired over his person by the service of process upon him within the time and in the mode prescribed by statute. In other words, it was indispensable that the docket, by a reasonable intendment, disclose the justice had jurisdiction of the person of the defendant. While it is true the docket entry

shows that the plaintiff appeared, the trial was had, and judgment was rendered on the 2d day of May, 1891, yet it is not shown that that was the day fixed for the return of the summons; nor does the docket state at what hour the plaintiff appeared and the case was called for trial. By section 916 of the Code the parties to a suit in justice court are given one hour in which to appear, after the time named in the summons for appearance; and unless the plaintiff appears within the hour, jurisdiction is lost where the defendant makes default. So far as the justice's docket discloses, the case may have been called and judgment rendered before the hour mentioned in the summons, or several hours thereafter. The omission of the justice to state in his docket the hour for the appearance of the defendant and the time when the case was called for trial are jurisdictional defects, and render the judgment void. (*Mudge v. Yaples*, 25 N. W. Rep. [Mich.], 297; *Post v. Harper*, 28 N. W. Rep. [Mich.], 161.) The doctrine of presumptions in favor of the regularity of the proceedings of courts of general jurisdiction does not apply to courts of inferior and limited jurisdiction, but as to such courts, the facts necessary to give jurisdiction must fairly appear from the record. (*State v. Berry*, 12 Ia., 60; *Goodrich v. Brown*, 30 Ia., 291; *McCurdy v. Baughman*, 1 N. E. Rep. [O.], 93; *Repine v. McPherson*, 2 Kan., 340; *Hargis v. Morse*, 7 Kan., 415.) It is a familiar rule that a personal judgment without jurisdiction of the person of the defendant is void. (Cases *supra*.)

There being no valid judgment, the next question presented is whether the execution and levy thereunder conferred upon Artlip or the execution creditor any right or authority to hold the property seized under the writ. It is a general rule, deducible from the authorities, that a sheriff or constable is not required to look beyond the process placed in his hands; and if it be regular on its face, and issued by a court having jurisdiction of the subject-matter,

he will be protected in the execution of the process when proceeded against as a tort-feasor, even though the judgment may be void; but the rule is merely one of protection, and confers no right beyond that. Notwithstanding an execution fair and regular on its face is sufficient to protect the officer serving it from personal responsibility as a trespasser, yet the writ alone cannot confer any right of property; but where the officer claims property under it he must establish that the process was issued upon a valid, unpaid judgment. If the execution is issued upon a void judgment, a levy under the writ will confer upon the officer no right to hold the property as against the owner. (*Campbell v. Williams*, 39 Ia., 646; *Balm v. Nunn*, 19 N. W. Rep. [Ia.], 810; *Beach v. Botsford*, 1 Doug. [Mich.], 199; *Le Roy v. East Saginaw City R. Co.*, 18 Mich., 233; *Gidday v. Witherspoon*, 35 Mich., 368.)

In reaching this conclusion we have not overlooked the provisions of sections 182 and 1034 of the Code of Civil Procedure relating to affidavits for the replevin of property, and the decision of this court in the case of *Wilson v. Macklin*, 7 Neb., 50. Under the foregoing sections an order of replevin cannot be issued unless an affidavit of the plaintiff, his agent or attorney, is filed, setting up, among other things, that the property "was not taken in execution on any order or judgment against said plaintiff," etc. The purpose of the statute in requiring such an averment was to prevent one from replevying property which has been seized upon execution issued upon a valid judgment against him. Therefore the plaintiff is required to make oath that it has not been so taken before the writ can be obtained. In *Wilson v. Macklin*, *supra*, the replevin affidavit stated that the "goods and chattels were not taken in execution on any order or judgment against said plaintiff," but were taken by execution issued against plaintiff on a void judgment, and it was held that the affidavit was defective, and further that in that action the plaintiff could

not assail the validity of the judgment upon which the execution issued. This construction of the provisions of the Code is too literal. To construe the statute as prohibiting in all cases the replevin of property which has been levied upon by an officer under an execution would prevent a judgment debtor whose goods have been seized under such a writ from maintaining replevin therefor, although the judgment should be paid off after the levy is made, or the judgment should be reversed while his property remained in the officer's hands. The legislature never so intended, nor was it the design of the law-makers that the possession of property taken by virtue of an execution issued upon a void judgment could not be recovered by replevin. Without a valid judgment there can be no valid execution. *Adams v. Hubbard*, 30 Mich., 104, was replevin against an officer for property held by virtue of a levy upon an execution issued by a justice of the peace against the plaintiff in replevin. Evidence was introduced tending to prove that the judgment upon which the execution sued out was void. The circuit court directed a verdict for the defendant. Upon a review of the case the supreme court say: "This was erroneous. If the justice had acquired no jurisdiction there was no judgment, and the pretended execution was no execution within the meaning of the statute which prohibits a defendant in execution for bringing replevin for property taken upon it; and though, if regular upon its face, it would protect the officer when proceeded against as a wrong-doer, it cannot be made the basis of a claim of right to the property seized without proof of a valid judgment." To the same effect are *Campbell v. Williams*, *supra*; *Balm v. Nunn*, *supra*; *Cobbey*, Replevin, sec. 312; *White v. Jones*, 38 Ill., 159. It follows from what has been said the trial court should have determined that the plaintiff was entitled to the possession of the property in dispute. The conclusion reached makes it unnecessary to consider the question argued by counsel

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whether Mr. Artlip was legally deputed by the justice to serve the execution. The judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

ROBERT HANNA V. EMERSON, TALCOTT & COMPANY.

FILED SEPTEMBER 17, 1895. No. 6241.

1. **Partnership: ACTION AGAINST INDIVIDUAL MEMBERS: SUMMONS.** This suit is not against a partnership, but against the individual members thereof, since the summons runs against the defendants individually, their firm relation being stated in the petition and summons as *descriptio personarum*.
2. ———: ———: ———: **SERVICE.** Service of summons in an action against the individual members of a partnership or firm is not governed by sections 24 and 25 of the Code, but by section 69, which authorizes service to be made either by delivering a copy of the writ to the defendant personally, or by leaving one at his usual place of residence.
3. **Action on Account: VENUE: SUMMONS.** An action on an account against two or more persons may be brought in the county in which any one of the defendants at the time resides or may be summoned. If such an action is not instituted in a county where a party defendant resides it must be begun in the county where the defendant then is, and summons must be served upon him while in such county.
4. **Transitory Actions: SUMMONS.** Where a transitory action is properly brought in one county under the provisions of section 65 of the Code, summons may be issued to any other county of the state to bring in other parties defendant.
5. **Summons: SERVICE.** Service of process in a personal action in a county brought upon a nominal defendant merely, who has no actual or substantial interest in the subject of the litigation adverse to the plaintiff, will confer no authority upon the court to bring in another party by the issuing of a summons to, and by the service of the same upon such person in another county.
6. **Alias Summons.** To entitle a party to the issuance of an alias

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summons it is not essential that he should refile the petition in the case, or file a new one.

7. **Limitation of Actions: PLEADING.** When it is not apparent from the face of the petition that the action is barred, the statute of limitations as a defense must be taken advantage of by answer.
8. **Summons: SERVICE.** The third point in the syllabus in *Morrissey v. Schindler*, 18 Neb., 672, held to have been overruled by implication by *Herron v. Cole*, 25 Neb., 692, and subsequent decisions.

ERROR from the district court of Douglas county. Tried below before FERGUSON, J.

E. T. Farnsworth, for plaintiff in error, cited: *Mayberry v. Willoughby*, 5 Neb., 368; *Hackley v. Patrick*, 3 Johns. [N. Y.], 537; *Hurley v. Estes*, 6 Neb., 386; *Allen v. Miller*, 11 O. St., 374; *Cobbey v. Wright*, 29 Neb., 274; *Dunn v. Haines*, 17 Neb., 560; *Hower v. Aultman*, 27 Neb., 251; *State v. School District*, 30 Neb., 520; *State v. King*, 34 Neb., 196; *Wanzer v. Bright*, 52 Ill., 35; *In re Robinson*, 29 Neb., 137; *Franklin v. Morris*, 26 Atl. Rep. [Pa.], 364.

J. J. O'Connor, contra.

NORVAL, C. J.

This suit was brought in the court below by the defendants in error against the plaintiff in error, Robert Hanna, and one J. M. Sugar, members comprising the firm of Hanna & Sugar, to recover the balance due upon an account for goods sold and delivered. Summons was issued on January 14, 1891, directed to the sheriff of Douglas county, which was duly served on the same day upon Sugar, but the writ was returned "not found" as to the defendant Hanna. On December 23, 1891, an alias summons was issued to Dawson county upon the defendant Hanna, which was served by delivering to him personally a certified copy thereof with all the indorsements thereon. Sugar made

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default, while Hanna made only a special appearance in the cause, and filed a motion to quash the summons for various reasons, which will not be here stated. This motion the court overruled, and judgment was entered in favor of the plaintiffs and against both Hanna and Sugar in the sum of \$1,283.80 and costs. Hanna brings the cause to this court by a proceeding in error to review the decision of the court below on the motion to quash. In noticing the objections to the summons we shall not attempt to follow the order given in the motion.

It is urged that there is no authority to issue a summons to a county other than the one where the action is brought in causes like the one at bar. This suit is not against the firm of Hanna & Sugar, but against the defendants individually, who at the time of the contracting of the indebtedness were members of such firm, their partnership relation being stated in the petition and process merely as *descriptio personæ*. Service of summons is not controlled by sections 24 and 25 of the Code. (*King v. Bell*, 13 Neb., 409; *Herron v. Cole*, 25 Neb., 692; *Rowland v. Shephard*, 27 Neb., 494; *Roggenkamp v. Hargreaves*, 39 Neb., 540.) Upon the point under discussion the above cases are in direct conflict with the holding in *Morrissey v. Schindler*, 18 Neb., 672, which last case must be regarded as overruled by implication by the later cases above mentioned. This action not being *in rem*, but *in personam*, therefore, under section 60 of the Code, may be brought in any county in which one of the defendants resides or may be summoned. (*Pearson v. Kansas Mfg. Co.*, 14 Neb., 211; *Cobbey v. Wright*, 29 Neb., 274; *Bair v. People's Bank*, 27 Neb., 577.) Where a transitory action is brought in a county where one or more of the defendants is properly served, then, under the provisions of section 65 of the Code, summons may be issued to any other county of the state to bring in other defendants. (Cases *supra*.) Sugar, who was served in Douglas county, it is said, is a mere nominal defendant,

made a party solely for the purpose of obtaining jurisdiction over Hanna by summons sent to Dawson county. If it were true that Sugar is only a nominal defendant, without any actual or substantial interest in the subject of the litigation adverse to the plaintiff, we grant service of summons upon him would confer no authority upon the court to bring in Hanna by serving him with summons in Dawson county. In other words, if Sugar was released by the plaintiff below from any and all liability on account of the indebtedness which is the basis of the present cause of action, as is insisted by the plaintiff in error, then Sugar was a nominal party merely, and was not a necessary or proper defendant. (*Dunn v. Haines*, 17 Neb., 560.) While there is some evidence in the record tending to sustain this contention of plaintiff in error, yet a reversal cannot be predicated thereon, since the question whether Sugar had been released, and the effect thereof on the case as to Hanna, was not raised in the trial court by the motion to quash, unless presented by the fifth ground of the motion, which is as follows: "That there was collusion and fraud between defendant Sugar and the plaintiff herein for the purpose of bringing this action into this court, as will appear more fully hereafter." The foregoing was insufficient to challenge the court's attention to the point that service was had in Douglas county upon a nominal defendant alone. The paragraph pleads no fact, but is the statement of a conclusion of law merely; hence we will not review the evidence introduced on the hearing of the respective parties tending to support and refute the claim made in the brief that the action was brought and the service of summons was obtained upon Sugar in Douglas county through fraud and collusion between Sugar and plaintiffs.

Another ground urged for quashing the summons is that neither of the defendants reside in Douglas county. So far as jurisdiction was concerned, it was wholly immaterial where the defendants or either of them resided, or

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whether they were residents of the county where the suit was instituted or not, provided either one of the defendants was within Douglas county at the time the suit was instituted. Sugar being at the time in said county, the action was properly brought therein. (*Coffman v. Brandhoeffer*, 33 Neb., 279.)

The point is also raised that the petition was filed in the court below a long time before the issuance and service of summons and while the defendant Hanna was absent from Douglas county. The record so discloses, but this fact is no ground for quashing the summons. Sugar being within Douglas county when the petition was filed and the summons which was served upon him was issued, the district court acquired jurisdiction of the action. The first summons having been returned not found as to Hanna, in accordance with the provisions of section 67 of the Code an alias writ was issued. The fact that it was issued nearly a year after the filing of the petition is of no consequence. Obviously this is so. The legislature never contemplated that a new petition shall be filed, or the original one refiled, at the time of the suing out of an alias summons. (*Davis v. Ballard*, 38 Neb., 830.)

Another ground stated in the motion to quash is that the summons was served upon the defendant Hanna by leaving a copy of the same at his usual place of residence, and not by delivering the same personally to him. There is no merit in this objection, for two reasons: First, it is not true that the writ was served by leaving a copy at the residence of the defendant. On the contrary, the return made by the officer upon the writ shows—and it is undisputed by any other portion of the record—that the summons was served by delivering to Hanna personally a copy of the same, including all of the indorsements thereon. In the second place, it is wholly immaterial whether the service was by delivering a copy of the writ to the defendant or by leaving the same at his usual place of abode. Service in either mode would be good. (Code, sec. 69.)

The objection that the summons notified the plaintiff in error that he had been sued in Dawson county is untenable. The venue of the writ is laid in Douglas county. It purports on its face to have been issued out of the district court of said county, recites the fact that the defendant has been sued in said district court by Emerson, Talcott & Co., and notifies him when he is required to answer. The summons is in due form, and in every respect meets the requirements of the statute.

Another proposition discussed in the briefs, and which is one of the grounds in the motion to quash, is that the petition does not state a cause of action against Hanna. In other words, that the statute of limitations has run against the claim as to said defendant. The action being upon an account, under the statute it became barred at the expiration of four years from the accruing of the cause of action. The question of the bar of the statute is not raised in this case by answer, but it is insisted that the petition on its face discloses that the cause of action arose at such a period of time that under the statute no action can be maintained. It is well settled in this state that when it is not apparent from the petition that the debt is barred, the statute of limitations must be taken advantage of by answer. It was not so raised in this case. Does the petition show that the action is barred? We do not think so. It is therein averred: "Said defendants are justly indebted to said plaintiffs in the sum of \$891.53 for a balance for goods sold and delivered to said defendants during the year 1887, and interest thereon from September 1, 1887, at eight per cent. An itemized statement is hereto attached and made a part of this petition." The itemized account or statement above referred to is not copied into the transcript. The allegation quoted is the only reference made in the petition to the matter, and it does not state the specific dates or times when the goods were delivered or when they were to have been paid for. If any portion of them were received

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after December 23 of that year the indebtedness matured after that date, and such may have been the case. So far as the petition discloses, then, the statute of limitations had not run, at least against the entire claim. The petition failing to show when the right of action accrued, it does not disclose that the statute of limitations had barred the action. The judgment is

AFFIRMED.

LEONARD K. SCROGGIN V. HARRIET R. JOHNSTON ET AL.

FILED SEPTEMBER 17, 1893. No. 5705.

1. **Pleading: AMENDMENTS.** The allowing of a petition to be amended so as to change the form of the action is permissible where the identity of the cause of action is preserved.
2. ———: ———: **EJECTMENT: CONTRACTS.** Plaintiff brought an action in ejectment, and the defendant pleaded a contract entered into by plaintiff for the sale of the premises and demanded affirmative equitable relief. The plaintiff was permitted to file an amended pleading, changing the form of the action from ejectment to that of foreclosure of the contract. *Held*, Not reversible error.
3. ———: ———. In a proper case the court may permit a pleading to be amended to conform to the proof.
4. **Rulings on Evidence: REVIEW: ASSIGNMENTS OF ERROR.** This court will not review the rulings of the trial court on the admission of testimony unless the particular rulings are pointed out in the petition in error.
5. **Trial to Court: ADMISSION OF INCOMPETENT TESTIMONY: REVIEW.** In a cause tried without a jury the admission of incompetent or irrelevant testimony is not reversible error.
6. **Conflicting Evidence: REVIEW.** The finding of the trial court, based on sufficient evidence, will not be disturbed on appeal, unless manifestly wrong.
7. **Estoppel: PLEADING: MAXIMS.** The facts constituting an estoppel *in pais* must be pleaded.

ERROR from the district court of Nuckolls county.
Tried below before MORRIS, J.

T. T. Beach and S. A. Searle, for plaintiff in error.

S. W. Christy, contra.

NORVAL, C. J.

An action of ejectment for the southeast quarter of the northwest quarter and the north half of the southwest quarter of section 33, town 3, range 6 west, in Nuckolls county, was instituted in the court below by Harriet B. Johnston against Charles H. Malsbury. Upon a trial to the court, without answer, judgment was rendered for the plaintiff, and upon the same day, at the request of the defendant, the judgment was set aside, and the statutory second trial was granted. Defendant was also given leave to answer, and, by consent of parties, L. K. Scroggin was made a party defendant. The petition states that the plaintiff has the legal estate in the premises described and is entitled to possession of them; that the defendant unlawfully withholds possession and has received the rents and profits of said lands and applied the same to his own use, amounting to the sum of \$600. The answer of Scroggin contains a general denial, after which it sets up that the plaintiff, formerly Harriet R. Spurek, on the 1st day of February, 1884, entered into a contract in writing whereby she agreed to convey said premises to Malsbury upon his paying the sum of \$2,000, as follows: \$500 cash, and the remaining \$1,500 in five equal payments of \$300 each, commencing on February 1, 1889, with ten per cent interest from date of contract, the said \$300 payments being evidenced alone by said contract and for which no promissory notes were given; that Malsbury executed and delivered to plaintiff his two promissory notes of \$250 each in settlement of the \$500 cash payment; that said contract,

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or article of agreement, was duly acknowledged and recorded; that plaintiff on July 12, 1884, sold and assigned to J. W. Kline all her right, title, and interest in and to said contract and moneys described therein, and indorsed and delivered to said Kline the said two promissory notes; that subsequently said Kline, his wife joining with him, sold, assigned, and transferred said contract and moneys therein promised to the defendant L. K. Scroggin, and said Kline indorsed and transferred said two notes to said Scroggin, to whom defendant Malsbury has since paid said notes with the accrued interest thereon, as well as the interest on the five \$300 payments; and that Malsbury has made no other or further payments thereon, for the reason plaintiff has notified him not to do so. The answer closes with a prayer that the court find the amount due Scroggin on said contract, together with the amount to become due thereon, and decree the same shall be paid to him, and upon such payments being made the court direct said plaintiff to convey the premises to Malsbury, or if the court shall find the plaintiff has no interest in the premises, that he be required to convey the same to Scroggin, and that plaintiff be enjoined from further prosecuting the suit, and for general relief. Malsbury's answer was substantially the same as the one filed by Scroggin, with the exception that it contained the further averments to the effect that he has complied with all the terms of the contract up to the time of receiving notice from plaintiff not to pay any moneys upon the contract to either Kline or Scroggin, and that Malsbury is now, and always has been, ready to perform each and all the stipulations of said contract by him to be performed, and is now ready and willing to make payment in full of all moneys due and to become due under the contract. This defendant prayed the court to determine who has the right to the money and to whom it shall be paid; that upon making payment to such party as the court shall direct plaintiff be required to

convey the premises to said answering defendant according to the terms of said contract; that plaintiff be restrained from further prosecuting this suit, and that this defendant receive such other and further relief as justice and equity demanded. For reply to the answers plaintiff denies each averment therein contained not expressly admitted; admits the execution of the contract between herself and Malsbury, set forth in the answer; denies that she assigned or sold the contract to Kline or any one else; denies that Scroggin is entitled to receive the money on said contract of purchase or that he is entitled to a deed to said premises or any part thereof; avers that the assignment from Kline and wife to Scroggin was made during the pendency of the suit, and that Malsbury has failed to make the payments and perform the covenants and conditions of said contract on his part, whereby said contract is forfeited. Subsequently, by leave of court, Malsbury, by an amendment to his answer, admits he is in possession of the lands, but says he entered in possession under the contract of purchase dated February 1, 1884; avers that in good faith he has paid to Scroggin on said contract, believing him to be the owner thereof, the following sums: \$450 about February 1, 1885, and \$425 about February 1, 1886; that on or about April 4, 1888, he executed and delivered to Scroggin a note for \$411.44, secured by a chattel mortgage, of which amount \$228.75 was to be applied in payment of interest on said contract of purchase; that defendant has made lasting and valuable improvements upon the land of the value of \$600. He prays the court to determine who is entitled to the purchase money, and for judgment against Scroggin for the several sums he paid him, with interest, in case the court decrees the plaintiff is the owner of the contract and entitled to receive the moneys therein called for. Upon the issues thus formed by the several pleadings the cause was tried to the court, and at the close of the trial plaintiff was permitted, over objection of counsel for

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plaintiff in error, to file an amended or supplemental petition to conform to the proofs, in which it is alleged, in substance, that Malsbury was in possession of the premises under the contract of purchase already mentioned, which instrument it is alleged was afterwards taken from plaintiff's possession without her knowledge or consent and without her receiving any value therefor from any person whomsoever; that through some source to her unknown, except by the testimony adduced on the trial, Scroggin obtained possession of said contract, and has collected the sums due thereon from Malsbury up to February 2, 1887, without the knowledge or consent of plaintiff. The prayer is that an account be taken of the amount due plaintiff on said contract from Malsbury, and that a decree be rendered for a sale of the premises to satisfy said sum, unless the same is paid by a day fixed by the court, and for general equitable relief. The court below found that plaintiff never delivered the assignment of said contract to Kline, nor authorized any one else to do so for her, but that the same was by her then husband wrongfully and fraudulently abstracted from plaintiff's possession, and by him delivered to Kline to pay a part of her husband's indebtedness to Scroggin and for the payment of which said Kline was surety; that Malsbury has not paid to plaintiff any portion of the purchase money for the lands covered by said contract of sale, but has paid to Scroggin the sum of \$1,104.19; that there is due from Malsbury to plaintiff on said contract \$3,583.26 for principal and interest, and that there is due Malsbury from Scroggin for moneys paid him on account of said contract the said sum of \$1,104.19. A decree of foreclosure and sale of the premises was entered in favor of the plaintiff, the several assignments of the contract were annulled, and judgment was entered upon the finding in favor of Malsbury and against Scroggin for \$1,104.19, and execution was awarded therefor. From the findings and judgment Scroggin prosecutes a petition in error.

The first argument is directed to the ruling of the trial court in permitting the plaintiff below, after the evidence had been all taken, to file an amended or supplemental petition, whereby the form of the action was changed from a suit at law to a purely equitable action. It is true the suit, as originally brought, was in ejectment to recover the possession of land, and that such an amendment of the proceedings was allowed as to change the form of the action to that of foreclosure of a land contract upon the same premises, yet a reversal ought not to be ordered in consequence thereof. This court has decided that the permitting of an amendment of a petition which changes the form of the action is of no consequence, so long as the identity of the cause of action remains. (*Roberts v. Swearingen*, 8 Neb., 363; *McKeighan v. Hopkins*, 19 Neb., 33; *Schuyler Nat. Bank v. Bollong*, 28 Neb., 684; *Homan v. Hellman*, 35 Neb., 414.) In the case last cited, which was an action to quiet title to real estate, the petition was amended to state a cause of action in ejectment to recover the same premises, and such amendment was held not to be erroneous. The case reported in 19 Neb. was a suit in ejectment, and the court permitted an amendment to make the action one to redeem. In *Robinson v. Willoughby*, 67 N. Car., 84, the plaintiff was permitted to amend his complaint, changing the form of the action from ejectment to that of foreclosure of a mortgage. In the case at bar it will be observed that a judgment was rendered in favor of the plaintiff for the recovery of the premises without any defense being interposed. Subsequently, on request of the defendant Malsbury, the statutory second trial was granted, when he answered, and Scroggin was permitted to intervene. The answers of both the defendants set up matters for equitable cognizance, and equitable relief was demanded. The cause was tried by all the parties upon the theory that the action was one for the equity side of the court. Scroggin, therefore, cannot now be heard to complain that the

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form of the action was changed. It was inaccurate for the plaintiff to designate his amended pleading as a "supplemental petition," since it pleaded no new facts accruing after the filing of his original petition, but contained merely a statement of the transactions constituting his cause of action arising before the bringing of the suit. Technically it was an amended petition, but the fact that it was not so styled and designated by proper indorsement is immaterial. In a proper case the court may permit a pleading to be amended to conform to the facts proved. (*Keim v. Avery*, 7 Neb., 54; *Homan v. Steele*, 18 Neb., 652; *Brown v. Rogers*, 20 Neb., 547; *Ward v. Parlin*, 30 Neb., 376; *Whipple v. Fowler*, 41 Neb., 675.) We fail to discover any abuse of discretion in permitting the amended pleading to be filed.

Complaint is made because of the alleged errors in the rulings of the trial court on the admission of testimony offered by the plaintiff. We cannot reverse the judgment on that ground, even though the rulings were erroneous—First, because the points were not sufficiently presented by the petition in error. No particular ruling is therein specified or called to our attention, the assignment being that the trial court permitted and received improper, immaterial, unimportant, and irrelevant testimony on behalf of the plaintiff. Like assignments in a petition in error have been invariably held bad. (*Wiseman v. Ziegler*, 41 Neb., 887; *Wonderlick v. Walker*, 41 Neb., 806.) In the next place the cause was tried to the court without the intervention of a jury, and the rule in such case is that error cannot be predicated in the reviewing court upon the erroneous admission of testimony. (*Ward v. Parlin*, 30 Neb., 376; *Whipple v. Fowler*, 41 Neb., 675, and cases there cited.)

Error is alleged in that the court below propounded questions to the plaintiff, on re-cross-examination, while a witness in her own behalf. Our attention has been challenged

to but one interrogatory put by the court to the witness to which an objection was made by plaintiff in error "to the court taking the part of counsel in the case," and that is found on page 26 of the bill of exceptions. The cross-examination of Mrs. Johnston was conducted by Mr. Beach, during which he asked her, "You paid no attention to what became of the Malsbury assignments and notes?" to which she made answer, "Yes; I put them away." Q. "Did you until 1887 pay any attention to it?" A. "No, sir." Then the court asked the witness this question, which is the one objected to: "You mean you paid no attention to the assignment that you had made, or the notes from the time you made them. Do you mean that?" The reply was: "I took the papers home and put them in the secretary with my other papers. That is the assignment and the notes. I took them home and put them with my other papers in the secretary." It is plain that the object and purpose of the court in propounding the interrogatory was to ascertain if the witness understood the question Mr. Beach had framed in regard to whether she paid any attention to what became of the Malsbury assignment and notes. There was absolutely no evidence of there being a Malsbury assignment, while there was testimony concerning an assignment made by the plaintiff of the contract with Malsbury. It was the duty and province of the court to see that the witness comprehended the questions asked, in order that they might be answered understandingly.

It is insisted that the findings, decree, and judgment are not supported by the evidence and are contrary to law. That Mrs. Johnston executed an assignment of the land contract to Kline there is no room for doubt, the main question of fact which the trial court was called upon to determine being whether or not there was a delivery of the Malsbury contract, the assignment thereof and the notes of the plaintiff to Kline. There is no claim that Mrs. Johnston personally delivered them, but the evidence in-

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roduced by the defendant is to the effect that they were delivered by her husband with her knowledge and consent, while the plaintiff testified unequivocally that after she executed the assignment she took it home and placed the same, together with the notes and contract, in a drawer of the secretary in which she usually kept her papers; that she did nothing further with them, and did not see them again until at the trial; that she received nothing for making the assignment; that she was induced to execute the assignment upon the statement made by her husband that Mr. Kline would pay \$2,000 for the contract and notes, and that the papers were to be delivered to Mr. Kline upon his paying the money, which was never done. The evidence on behalf of Scroggin tends to contradict that introduced by the plaintiff upon the question of the delivery of the assignment, notes, and contract. The testimony was, in the main, that of interested witnesses, who testified diametrically opposite to each other. Scroggin's principal witness was Mr. Johnston, the husband of the plaintiff, although they have not lived together since 1885. Under the statute of Nebraska and the construction placed thereon by repeated decisions of this court, Mr. Johnston was disqualified from testifying against his wife. (*Buckingham v. Roar*, 45 Neb., 244.) Upon a careful perusal of the bill of exceptions we are satisfied there is sufficient competent evidence in the record to support the findings of the trial court that plaintiff never delivered the contract, assignment, and notes to Kline, and that their possession was obtained without her knowledge or consent, although the preponderance of the evidence is on the other side of the scale. We can but apply the rule that where the evidence is conflicting, the findings of the trial court based thereon will not be disturbed upon appeal. There being no delivery of the assignment, no title or interest in and to the contract or the moneys therein mentioned passed to Kline, nor to his assignee Scroggin. (*Steffian v. Milmo Nat. Bank*, 6 S.

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W. Rep. [Tex.], 823; *Moody v. Dryden*, 34 N. W. Rep. [Ia.], 210; *Patrick v. McCormick*, 10 Neb., 1; *Cotton v. Gregory*, 10 Neb., 125.)

Plaintiff in error argues that he is a *bona fide* holder of the notes for value before maturity, and is therefore entitled to protection. A sufficient reply to this is, no such issue was raised by his answer. He does not plead that he became the owner of the notes before due in the usual course of business without notice of Mrs. Johnston's rights, nor does he aver that he paid anything of value therefor. The five payments of \$300 each described in the contract, as elsewhere stated, were not evidenced by notes of any kind. The contract was in no sense commercial paper, and therefore Scroggin is not entitled to the same protection as a *bona fide* holder of negotiable paper purchased before maturity.

It is finally insisted that Mrs. Johnston is estopped from claiming the amount due on the land contract by placing it, duly assigned, together with the notes, in the possession of her husband, or where he had access to them. Counsel for the plaintiff is quite right when he says this question is raised for the first time in this court in the brief filed herein, and therefore such defense is not availing. It will be observed, from the synopsis of Mr. Scroggin's answer, that he has pleaded no estoppel, which he should have done if he desired to invoke the principle of law, which has become axiomatic, that "where one of two innocent persons must suffer loss by the fraud or misconduct of a third, he who has enabled the third person to occasion the loss must be the person who shall suffer." There being no reversible error in the record, the judgment is

AFFIRMED.

RAGAN, C., not sitting.

STATE OF NEBRASKA, EX REL. ARTHUR S. CHURCHILL, ATTORNEY GENERAL, V. GEORGE P. BEMIS, CHARLES H. BROWN, D. CLEM DEAVER, WILLIAM J. BROATCH, PAUL VANDERVOORT, AND ALBERT C. FOSTER.

FILED SEPTEMBER 17, 1895. No. 7947.

1. **Constitutional Law: STATUTES: AMENDMENT: REPEAL.** Section 11, article 3, of the Constitution provides: "No law shall be amended unless the new act contain the section or sections so amended, and the section or sections so amended shall be repealed." *Held*, That the term "repeal" is therein employed in the sense in which it was understood when the constitution was adopted in 1875.
2. ———: ———: ———: ———. It had before that time been definitely settled as a rule of construction that the simultaneous repeal and re-enactment of a statute in terms, or in substance, is a mere reaffirmance of the original act, and not a repeal in the strict or constitutional sense of the term.
3. ———: ———: ———: ———. The great object to be attained by that provision of the constitution is certainty in legislation, hence all that is required is that the amendatory act shall be definite and certain as to the law amended, and germane to the original act. (*State v. Babcock*, 23 Neb., 128.)
4. **Metropolitan Cities: GOVERNMENT: FIRE AND POLICE COMMISSIONERS: CONSTITUTIONAL LAW: STATUTES.** In 1887 an act was passed entitled "An act incorporating metropolitan cities, and defining, regulating, and prescribing their duties, powers and government." In 1889 section 145 of said act was amended by the addition thereto of a provision not affecting its general scope and purpose, and the original section was repealed, the title of the amendatory act being "An act to amend section 145 of an act etc., and to repeal said section as heretofore existing." In 1891 said section was further amended by the addition of a provision not affecting its general object, and the section as amended was repealed, both acts preserving the number and language of the original section, except as affected by such amendment. In 1895 an act was passed entitled "An act to amend section 145 of 'An act incorporating cities of the metropolitan class, and defining, regulating, and prescribing their

duties, powers and government,' approved March 30, 1887, and as subsequently amended." *Held*, That the act last mentioned is not inimical to the constitution on the ground that the original section was repealed by the act of 1889.

5. **Constitutional Law: STATUTES: TITLES OF BILLS.** The provision of section 11, article 3, of the constitution, viz., "No bill shall contain more than one subject, and the same shall be clearly expressed in the title," was intended to prevent surreptitious legislation and not to prohibit comprehensive titles. The test is not whether the title chosen by the legislature is the most appropriate, but whether it fairly indicates the scope and purpose of the act.
6. **Statutes: REPEAL BY IMPLICATION.** An act which embraces the entire subject-matter of a prior act and also additional provisions will be construed as a repeal of the latter by implication.
7. **Metropolitan Cities: PROVISION OF CHARTER FOR FIRE AND POLICE COMMISSIONERS: PARTY AFFILIATIONS: CONSTITUTIONAL LAW: COMITY.** The provisions of the charter of the city of Omaha for a board of fire and police commissioners composed of three members "at least one from each of the two political parties casting the largest number of votes at the last preceding general election," does not conflict with the constitution of this state or the constitution of the United States in prescribing party affiliation as a qualification for office. If such provision be not mandatory in the sense that it is binding upon the appointing power,—a question not decided,—it is at least advisory and will be accorded consideration consistent with the comity existing between different departments of government.
8. ———: ———: **TIME STATUTE TOOK EFFECT.** The act of 1895 amendatory of the act of 1887 (Session Laws, 1895, ch. 10) was passed over the veto of the governor April 4, but did not, under the provisions of section 24, article 3, of the constitution, take effect until three calendar months after the adjournment of the legislature for that session. *Held*, That the provision therein for the appointment of fire and police commissioners for cities of the metropolitan class within thirty days from its passage refers to the time when said act took effect as a law.
9. ———: **APPOINTMENT OF FIRE AND POLICE COMMISSIONERS: ABSENCE OF MEMBER OF APPOINTING BOARD: VALIDITY OF PROCEEDINGS.** In the absence of a special provision to the contrary, the presence of all the members thereof is not indispensable to the transaction of business by a public body or board. Where members having reasonable notice neglect to at-

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tend the meetings of a board charged with duties to the public, the action of those present, if a majority of all or a quorum authorized by statute or by law, is the action of the board and equally binding as if all had attended and expressly assented thereto.

ORIGINAL action in the nature of *quo warranto*, on the relation of the attorney general, to determine the rights of rival claimants to the offices of fire and police commissioners of the city of Omaha. *Judgment in favor of William J. Broatch, Paul Vandervoort, and Albert C. Foster.*

The facts are stated in the opinion.

A. S. Churchill, Attorney General, for the state.

E. W. Simeral and *Greene & Breckenridge*, for respondents *George P. Bemis, Charles H. Brown, and D. Clem Deaver*:

The act of 1895, chapter 10, Session Laws, is void because the section of the act it purports to amend and repeal did not exist, and it therefore has nothing to rest on. (*Ex parte McCordle*, 7 Wall. [U. S.], 514; *Coffin v. Rich*, 45 Me., 507; *Dogge v. State*, 17 Neb., 143; *State v. Berka*, 20 Neb., 377; *State v. Babcock*, 23 Neb., 133; *State v. Benton*, 33 Neb., 834; *Trumble v. Trumble*, 37 Neb., 340; *City of South Omaha v. Taxpayers' League*, 42 Neb., 671; *Burnett v. Turner*, 87 Tenn., 124; *Hall v. Craig*, 125 Ind., 523; *Wall v. Garrison*, 11 Col., 515; *Maxwell v. State*, 89 Ala., 150; *Louisville & N. R. Co. v. City of East St. Louis*, 134 Ill., 656; *Sovereign v. State*, 7 Neb., 409; *Smails v. White*, 4 Neb., 353; *Stricklett v. State*, 31 Neb., 674; *Smith v. State*, 34 Neb., 689.)

The act is void as being in violation of the constitutional provision that no bill shall contain more than one subject, and the same shall be clearly expressed in its title. (*White v. City of Lincoln*, 5 Neb., 516; *Ives v. Norris*, 13 Neb., 252; *Wall v. Garrison*, 11 Col., 515.)

The act is broader than its title and is therefore void. (*Trumble v. Trumble*, 37 Neb., 340; *People v. Denahy*, 20 Mich., 349; *Weigel v. City of Hastings*, 29 Neb., 379; *Wolf v. Taylor*, 98 Ala., 254; *State v. Nomland*, 3 N. Dak., 427; *Elliott v. State*, 91 Ga., 694; *Clark v. Board of Commissioners of Wallace County*, 39 Pac. Rep. [Kan.], 225; *Commonwealth v. Samuels*, 14 Pa. C. C. Rep., 423; *Perkins v. City of Philadelphia*, 156 Pa. St., 539; *People v. Fleming*, 7 Col., 230; *City of Grand Rapids v. Burlingame*, 93 Mich., 469; *Gatling v. Lane*, 17 Neb., 84; *In re White*, 33 Neb., 819.)

The act is unconstitutional for the reason that it is in conflict with other sections of the city charter. (*Trumble v. Trumble*, 37 Neb., 347; *City of South Omaha v. Taxpayers' League*, 42 Neb., 671; *Ex parte Hewlett*, 40 Pac. Rep. [Nev.], 96.)

Two members of the old board were appointed for four years from May 7, 1895. They are not legislated out by any express provision of the act. They have never been tried and removed. At the time of their appointment their term of office was fixed by law. They should be permitted to serve out their term. (*State v. Board of Public Lands and Buildings*, 7 Neb., 42; *State v. McColl*, 9 Neb., 203; *State v. Seay*, 64 Mo., 89.)

The provision of the act making party affiliation a test of eligibility to office is in conflict with section 1 of the fourteenth amendment of the constitution of the United States providing, "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law." The provision violates section 3 of the state bill of rights. It also violates section 15 of article 3 of the state constitution providing that the legislature shall not pass local or special laws "granting to any corporation, association, or individual any special or exclusive privilege, immunity, or

franchise whatever." (*Attorney General v. City of Detroit*, 58 Mich., 213; *City of Evansville v. State*, 118 Ind., 426; *Rogers v. City of Buffalo*, 123 N. Y., 173.)

The law is incapable of execution, and therefore void. (Sutherland, Statutory Construction, secs. 237, 238.)

The new board was not legally appointed. Where a power is conferred upon three or more persons in a matter of public concern, requiring the exercise of discretion and judgment, and contains no directions respecting the number of those who may exercise the power, such exercise will not be valid unless all act, or unless all meet for consultation. After a legal meeting has taken place a majority may govern. (*People v. Coghill*, 47 Cal., 361; *Scott v. Detroit Young Men's Society*, 1 Doug. [Mich.], 121; *State v. Wilksville*, 20 O. St., 293; *Hudley v. Mayor of City of Albany*, 33 N. Y., 606; *People v. Whiteside*, 23 Wend. [N. Y.], 9; 26 Wend. [N. Y.], 634.)

In absence of an emergency clause the act in providing that the commissioners shall be appointed within thirty days after its passage violates the following provision of the constitution: "No act shall take effect until three calendar months after the adjournment of the session at which it was passed, unless in case of emergency." (*Harding v. People*, 10 Col., 387.)

Courts should not hesitate to declare legislative acts invalid when they are found to be in substantial conflict with the fundamental law of the state. (*State v. Bartley*, 41 Neb., 277.)

Hall, McCulloch & Clarkson, for respondents William J. Broatch, Paul Vandervoort, and Albert C. Foster:

The appointment by a majority of the board is valid. (*Williams v. Inhabitants of School District*, 21 Pick. [Mass.], 82; *Horton v. Garrison*, 23 Barb. [N. Y.], 179; *Sprague v. Bailey*, 19 Pick. [Mass.], 442; *First Nat. Bank of Bennington v. Town of Mt. Taber*, 52 Vt., 87; *Louk v. Woods*,

15 Ill., 256; *Walker v. Rogan*, 1 Wis., 597*; *Merchant v. North*, 10 O. St., 251; 19 Am. & Eng. Ency. Law, pp. 465, 466; *Hopkins v. Scott*, 38 Neb., 661.)

In support of an argument in favor of the constitutionality of the act the following cases were cited: (*State v. Seavey*, 22 Neb., 454; *State v. Smith*, 35 Neb., 13; *Perry v. Gross*, 25 Neb., 826; *In re White*, 33 Neb., 812; *Miller v. Hurford*, 13 Neb., 13; *Galling v. Lane*, 17 Neb., 81; *State v. Ream*, 16 Neb., 681; *State v. Mayor of Kearney*, 28 Neb., 110; *State v. McColl*, 9 Neb., 203; *Taylor v. Courtney*, 15 Neb., 190; *Lawson v. Gibson*, 18 Neb., 137; *State v. Babcock*, 21 Neb., 599; *Brome v. Cuming County*, 31 Neb., 362; *State v. Maccuaig*, 8 Neb., 215; *State v. Howe*, 28 Neb., 618.)

The provision for the appointment of officers of different political affiliations does not invalidate the act. (*State v. Seavey*, 22 Neb., 454; *State v. Smith*, 35 Neb., 13; *People v. Hurlbut*, 24 Mich., 93.)

The expression in the law referring to the time the appointment should be made was intended to mean thirty days after the act took effect. (*Hardin v. People*, 10 Col., 387.)

POST, J.

This is an original proceeding in the nature of a *quo warranto*, on the relation of the attorney general, under the provisions of section 714 of the Civil Code, to determine the rights of the respondents, who claim to be members of the board of fire and police commissioners for the city of Omaha. By section 145 of the act of 1887, entitled "An act incorporating metropolitan cities, and defining, regulating, and prescribing their duties, powers and government," hereafter referred to as the charter of the city of Omaha, provision is made for a board of fire and police commissioners consisting of five members, to-wit, the mayor, and four electors of said city to be appointed by the governor. In 1889 and 1891 said section was amended by the addition

thereto of provisions to which reference will be hereafter made, but which do not call for notice in this connection. In 1895 an act was passed entitled "An act to amend section 145 of an act entitled 'An act incorporating metropolitan cities, and defining, regulating, and prescribing their duties, powers and government,' approved March 30, 1887, and as subsequently amended, and to repeal said section," and which it is conceded took effect not later than August 1 following, unless void for reasons hereafter considered. By the last mentioned act provision is made for a board of fire and police commissioners consisting of three members to be appointed by the governor, attorney general, and commissioner of public lands and buildings. It is disclosed by the pleadings upon which the cause is submitted, that on the day last named said board was composed of the following members, to-wit: Howard B. Smith, Virgil O. Strickler, D. Clem Deaver, and Charles H. Brown, all of whom had been in due form appointed by the governor, and Geo. P. Bemis, mayor of said city, and will, for convenience, be referred to as the old board. On the 2d day of August the respondents, William J. Broatch, Paul Vandervoort, and Albert C. Foster, were named as fire and police commissioners under the provisions of the act of 1895, the record of their appointment being as follows:

"AUGUST 2, 1895, 10 o'clock A. M.

"Appointing board for the appointment of fire and police commissioners for cities of metropolitan class met pursuant to written notice heretofore given of said meeting. Present, H. C. Russell, Com. P. L. & B., and A. S. Churchill, Attorney General.

"Whereupon the following proceedings were had: Hon. H. C. Russell was chosen chairman *pro tem.* and A. S. Churchill secretary. The meeting being called to appoint fire and police commissioners of the city of Omaha.

"Whereupon W. J. Broatch was appointed one of the said fire and police commissioners of said city for the term

ending December 31, 1895, Paul Vandervoort for the term ending December 31, 1896, and A. C. Foster for the term ending December 31, 1897, and commissions instructed to be issued accordingly.

"There being no other business, after waiting until 11 o'clock A. M. of said date the board adjourned.

"Record read and approved. H. C. RUSSELL,

"Chairman pro tem.

"A. S. CHURCHILL,

"Secretary."

Said respondents subsequently qualified in the manner prescribed by law, and will be referred to as the new board. Messrs. Strickler and Smith, upon the appointment and qualification of the new board, recognized the title of the latter and refuse to join in resisting their claims to the offices in controversy.

It should be remarked, as preliminary to an examination of the cause on its merits, that this court is not the keeper of the legislative conscience, and that the motives of members of the respective houses, or the wisdom and propriety of the act involved, present no question of judicial cognizance. That act is, we may assume, as are most if not all measures of like character, wholly indefensible; still the caustic arraignment of counsel should have been addressed to another department of the government, since it is not within our province to criticise or defend it as a matter of legislative policy. It should be remembered, too, that all presumptions are in favor of legislative acts, and that no act will be declared invalid unless plainly and irreconcilably in conflict with the constitution. With these general observations we will proceed to a consideration of the questions discussed, and which will, so far as practicable, be examined in the order presented by counsel for the old board.

It is in the first place claimed that section 145 of the act of 1887 was repealed by the act of 1889 amendatory thereof, and that the attempted amendment of 1895 is ac-

cordingly without force or effect. That argument renders necessary an examination of the several acts mentioned, so far as they relate to the subject in hand. Section 145, as originally adopted, not only provides for a board of fire and police commissioners, not more than two of whom shall belong to one political party, but also, in explicit terms, defines their powers and duties. The act of 1889, entitled "An act to amend sections * * * 145, * * * and to repeal said sections as heretofore existing," is a literal re-enactment of the section amended, except that it provides for the government and control of the police of the city in accordance with rules adopted by the board of fire and police, instead of by ordinance; and the further provision therein for the giving of bonds by the members of the board. The act of 1891 provides for the appointment of the members of the board from the three political parties casting the largest number of votes at the last preceding election, but is otherwise a re-enactment of section 145 as previously amended. The following paragraph from the brief of counsel is the strongest possible presentation of the question from the standpoint of the old board:

"Section 145 was amended by section 46, chapter 13, Laws, 1889, and the section as originally enacted was repealed, so that it ceased then to exist. Section 46, act of 1889, was carried into the Compiled Statutes as section 145, chapter 12a, entitled 'Cities of the Metropolitan Class,' and was in turn amended by section 32, chapter 7, Laws, 1891, in the title of which it was designated as section 145 of chapter 12a, Compiled Statutes, and the section amended was expressly repealed. So that section 145, chapter 12a, Compiled Statutes then ceased to exist, and the law that continued thereafter in force was neither section 145 of the act of 1887, nor section 46 of the act of 1889, but section 32 of the act of 1891, and, as section 145 of the act of 1887 had not been in existence since 1889, the act of 1895 touches nothing and is absolutely void."

The fallacy of that argument lies in the assumption that the effect of the amendatory acts is in any proper sense a repeal of the original section. True, as provided by section 11, article 3, of the constitution, "No law shall be amended unless the new act contain the section or sections so amended, and the section or sections so amended shall be repealed," but the term "repeal" is therein evidently employed in the sense in which it was understood at the time the constitution was adopted. It had before that time been definitely settled as a rule of construction that the simultaneous repeal and re-enactment of the same statute in terms or in substance is a mere affirmance of the original act, and not a repeal in the strict or constitutional sense of the term (*Ely v. Holton*, 15 N. Y., 595; *Moore v. Mansert*, 49 N. Y., 332; *Fullerton v. Spring*, 3 Wis., 667; *Middleton v. New Jersey & W. L. R. Co.*, 26 N. J. Eq., 269; *Wright v. Oakley*, 5 Met. [Mass.], 406; *Pacific Mail Steamship Co. v. Joliffe*, 2 Wall. [U. S.], 450), and the rule thus stated has been distinctly recognized by this court. (See *State v. McColl*, 9 Neb., 203, and *State v. Wish*, 15 Neb., 448.) In the case last cited MAXWELL, J., uses the following language: "We hold, therefore, that where the re-enactment is in the words of the old statute, and was evidently intended to continue in force the uninterrupted operation of such statute, that the new act or amendment is a mere continuation of the former act and is not in a proper sense a repeal." The following recent cases are in harmony with the foregoing and sustain the validity of the act assailed: *Commonwealth v. Kenneson*, 143 Mass., 418; *Hebrew Association v. Beushimal*, 130 Mass., 327; *Hancock v. District of Perry Township*, 78 Ia., 556; *State v. Kibling*, 63 Vt., 636. The act of 1891 did not abolish section 145 as originally enacted, or as amended in 1889, but, on the contrary, re-enacted it in terms with the exceptions above noted. Nor is the fact that the act of 1891 refers to the section as it appears in the Compiled Statutes at all ma-

terial, since it was the original act which was amended, the reference to the compilation being for convenience only.

Of the cases to which we are referred by counsel for the old board, *Coffin v. Rich*, 45 Me., 507, has been cited as an apparent exception to the rule above stated (see 23 Am. & Eng. Ency. of Law, 515); but the later statute, as appears from a careful examination of that case, imposed upon stockholders of corporations a liability different from that of the former act, and was construed as a technical repeal rather than a mere re-enactment of the old law. In *Louisville & N. R. Co. v. City of East St. Louis*, 134 Ill., 656, the facts are not fully reported, but it appears from the opinion of the court that the legislature had attempted to amend a section which "had been previously amended by a distinct and complete section." It cannot be determined whether the act referred to was amendatory merely, or whether it substituted new and distinct provisions for the original section. In *State v. Benton*, 33 Neb., 823, the act sought to be amended had been repealed by implication, leaving nothing to which the amendatory act could apply. In *Hall v. Craig*, 125 Ind., 523, the question of the validity of the later statute was not determined, the court preferring to treat the acts as *in pari materia*, although earlier decisions of that court seem to sustain the proposition here asserted, and may be regarded as exceptions to the rule. Other cases cited deal with repeals proper rather than amendatory acts, and need not be examined at length. The great object to be attained by the constitutional requirement is certainty in legislation, and to avoid the doubt and perplexity which would inevitably result from the amendment of statutes by reference to sentences or words. Assaid by this court in *State v. Babcock*, 23 Neb., 128: "All that the law requires is that the amendatory statute shall be definite and certain as to the statute amended, and germane to the title of the original act." When tested by that rule it would seem that the reference

to the prior act as section 145 of the act of 1887, "and as subsequently amended," is not appropriate merely, but is probably the most accurate that could have been devised, since it satisfied the demand of the constitution and is consonant with reason.

It is next argued that the provisions of the law of 1895 for the removal, by the officers designated as the appointing board, of fire and police commissioners for official misconduct is broader than its title, and accordingly invalidates the entire act; but that law is, as we have seen, amendatory of the law of 1887, and not an independent measure, hence we must look for its title to the act last mentioned. We shall not examine the cases cited from other states, since every phase of the question presented has been fully considered by this court. The constitutional requirement, viz., "No bill shall contain more than one subject, and the same shall be clearly expressed in its title," (Constitution, sec. 11, art. 3,) was intended to prevent surreptitious legislation, and not to prohibit comprehensive titles. The test is not whether the title chosen is the most appropriate, but whether it fairly indicates the scope and purpose of the act. (*Boggs v. Washington County*, 10 Neb., 297; *State v. Ream*, 16 Neb., 681; *State v. Babcock*, 23 Neb., 128; *Kansas City & O. R. Co. v. Frey*, 30 Neb., 790; *Paxton & Hershey Irrigating Canal & Land Co. v. Farmers & Merchants Irrigation & Land Co.*, 45 Neb., 884.) Authority to remove unfaithful officers is a proper if not a necessary incident of municipal government, and the provision therefore is obviously within the title of the act "defining, regulating, and prescribing the duties and powers and government of cities of the metropolitan class."

Another criticism of the act under consideration is that it conflicts with certain other sections of the city's charter not therein referred to, among which are mentioned section 149a, chapter 12a, Compiled Statutes, authorizing the appointment of a police matron by the mayor, and section

167, providing that the mayor shall receive as a member of the board of fire and police commissioners the compensation allowed other members of said board. Section 149a is not found in the act of 1887, but in the act of 1893, entitled "An act to provide for the appointment of a police matron in cities, and to repeal any law inconsistent herewith." That the act of 1895 conflicts with those provisions is obvious, and since it embraces the entire subject-matter of the sections mentioned, operated as a repeal thereof by implication. (*Brome v. Cuming County*, 31 Neb., 362; *State v. Benton*, 33 Neb., 823.)

It is argued that the act under consideration violates the constitution of the state and the constitution of the United States by making party affiliation a qualification for office. The particular provision of the act assailed is the following: "The said appointing board shall, within thirty days from and after the passage of this act, appoint as the commissioners above named three citizens, at least one from the two political parties casting the largest number of votes for governor at the last preceding general election. One of these shall be designated in said appointment to serve until December 31, 1895, the second until December 31, 1896, and the third until December 31, 1897." The constitutional restrictions above referred to are section 3 of our bill of rights, viz., "No person shall be deprived of life, liberty, or property without due process of law," and section 15, article 3, as follows: "The legislature shall not pass local or special laws * * * granting to any corporation, association, or individual any special or exclusive privileges, immunity, or franchise whatever;" also section 1 of the fourteenth amendment to the constitution of the United States, viz., "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty, or property without due process of law." The question here presented was considered in

State v. Seavey, 22 Neb., 454, and *State v. Smith*, 35 Neb., 13, and determined adversely to the foregoing contention. We have, however, on account of the importance of the subject, concluded to briefly re-examine it in the light of authority.

Of the cases cited by counsel for the old board, *Attorney General v. City of Detroit*, 58 Mich., 213, cannot be regarded as authority, in view of the express restriction of the constitution of that state, which, after prescribing the form of oath to be taken by public officers, concludes as follows: "And no other oath, declaration, or test shall be required as a qualification for any office or public trust," while the only provision of our constitution upon the subject is that found in section 4 of the bill of rights, viz., "No religious test shall be required as a qualification for office." *City of Evansville v. State*, 118 Ind., 426, appears to be in point, but that case, if not indeed overruled, is opposed to the doctrine stated in the subsequent case of *Hovey v. State*, 119 Ind., 386, in which Elliott, C. J., uses this language: "It is within the authority of the legislature, by virtue of its general power, to require that the officers of this class shall be selected from different political parties, or that they shall be persons of peculiar skill and experience." Opposed to the contention of counsel are two classes of cases, of which the first, and more numerous, assert, without qualification, the power of the legislature, in the absence of express constitutional restriction, to prescribe particular qualifications for holding office, such as political affiliation. Other cases regard like provisions as directory, or, more accurately speaking, advisory merely, and binding upon the appointing power only within the limits of the comity existing between different departments of government. Of the first class may be mentioned the following cases: *Hovey v. State*, *supra*; *State v. Finger*, 28 N. E. Rep. [O.], 135; *Rogers v. City of Buffalo*, 123 N. Y., 173; *People v. Hoffman*, 116 Ill., 587; *Patterson v. Barlow*, 60 Pa. St.,

54. Among those which regard the provisions under consideration as advisory merely, may be cited the following: *In re Supervisors*, 43 Fed. Rep., 859; *State v. Seavey*, *supra*, and opinion of Cooley, J., in *People v. Hurlbut*, 24 Mich., 44. It is unnecessary to pursue the subject by examining the merits of the views thus stated, as both are adverse to the contention of counsel and are, it is believed, alike harmonious with the letter and spirit of our constitution. We observe in recent legislation, state and national, numerous acts of this character, and which have, except in the instances cited, been respected by both executive and judicial departments of the government. A familiar illustration is the provision of the Revised Statutes of the United States for juries drawn by commissioners of different parties. Another is the law in force for many years for the appointment by the circuit court of supervisors of elections in certain cases. These statutes, although frequently before the courts for construction, have never, within our knowledge, been assailed as unconstitutional. (See *United States v. Paxton*, 40 Fed. Rep., 136; *In re Supervisors*, 43 Fed. Rep., 859; *In re Supervisors*, 20 Blatch. [U. S.], 13.) But a case directly in point, which has apparently been overlooked by counsel for both parties, is the appointment by us of the present supreme court commission under the act of 1893. That act, it will be noticed, provides that no two of the three commissioners therein authorized, shall be members of the same political party. Every phase of the question was examined by the court as then organized and although a doubt was expressed as to the right of the legislature to control the discretion of the appointing power, we agreed that the provision mentioned was at least directory, a courteous request of the law-making power, to which full respect was accorded in the selection of our esteemed associates of the commission. The act last referred to having been subsequently assailed for the reasons now urged among others, was, after full consideration, held not to conflict

with the constitution of the state. (*In re Supreme Court Commissioners*, 37 Neb., 655.) It is thus apparent that the contention of counsel is without merit, being opposed both by reason and the pronounced weight of authority.

It is said that the act is inconsistent and incapable of execution by reason of the provision therein for the appointment of the board of fire and police within thirty days from and after its passage, to-wit, April 3, 1895, whereas said act did not take effect until three calendar months after the adjournment of the legislature for that session. (Constitution, sec. 24, art. 3.) To one familiar with legislative methods in this state, the apparent inconsistency suggests its own explanation, viz., that the bill, as originally introduced, contained an emergency clause providing that it should take effect upon its passage, and which was subsequently eliminated without amending the other provisions thereof so as to conform to its altered condition. It is evident that by the expression, "within thirty days from and after the passage of this act," is meant thirty days from the time when said act took effect as a law. Where a statute is ambiguous the courts, following established rules of construction, adopt that interpretation which will best promote its general object. (Endlich, *Interpretation of Statutes*, 196; *State v. Allen*, 43 Neb., 651.) The cases are numerous in which the foregoing general principle has been held applicable to facts substantially like those here involved. (See *Harding v. People*, 10 Col., 387; *Charles v. Lamber-son*, 1 Ia., 435; *Price v. Hopkin*, 13 Mich., 327.) In *Harding v. People*, *supra*, it is said: "In the absence of any emergency clause in view of the constitutional provision, the expression 'after the passage of the act,' as used in the law, can have but one meaning, namely, after the act goes into effect." With the view thus expressed we are entirely satisfied.

Finally, it appears from the record that the governor, for reasons to him appearing sufficient, but which need not

be discussed in this connection, declined to take any action whatever under the act above mentioned, and, although notified of the meeting called by the other members of the appointing board, refused to attend or in any manner participate in the selection of fire and police commissioners. It is argued that the concurrent action of the three state officers named in the act is essential to a valid appointment thereunder, hence the selection of the new board at such meeting in the absence of the governor is without authority and void; but to that proposition we cannot give our assent. On the contrary, it is clear that the presence and participation of the governor was not indispensable, he having been notified of the meeting and requested to attend. The action of the majority is, under the circumstances, the action of the board, and equally binding as if all had attended and expressly assented thereto. (*McInroy v. Benedict*, 11 Johns. [N. Y.], 402; *Horton v. Garrison*, 23 Barb. [N. Y.], 176; *Gildersleeve v. Board of Education*, 17 Abb. Pr. [N. Y.], 201; *Walker v. Rogan*, 1 Wis., 597; *Merchant v. North*, 10 O. St., 251; *Throop, Public Officers*, 112; *Mechem, Public Officers*, 572.) The reason upon which that doctrine rests is that public interests shall not be prejudiced by the neglect or caprice of a single member of a public body in failing or refusing to attend upon sufficient notice of its meetings; but where the law expressly requires the concurrent action of all the members of a board or body, all must participate therein, although that rule has no application to the act under consideration, which does not expressly, or by implication, require the action of all the members of the appointing board. We must not, from what is here said, be understood as indulging in any criticism upon the act of the governor, whose motives in refusing to co-operate with the other members of the appointing board are not impugned in this proceeding. It follows, however, from what has been said, that the respondents Broatch, Vandervoort, and Foster are the legally appointed

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members of the board of fire and police commissioners and as such are entitled to the possession and emoluments of the offices in controversy.

JUDGMENT ACCORDINGLY.

WASHINGTON D. PERCIVAL V. STATE OF NEBRASKA.

FILED SEPTEMBER 17, 1895. No. 6872.

1. **Contempt: COURTS: PUBLICATION REGARDING A PENDING CAUSE.** A publication regarding a cause during its pendency in court, which tends to corrupt or embarrass the administration of justice and to produce a prejudice in the minds of the public with respect to the merits of the cause, is a contempt and punishable.
2. ———: ———: ———: **CONCLUSIVENESS OF ANSWER.** Where, in a proceeding for an indirect or constructive contempt, consisting of the publication in a newspaper, the article upon which the complaint is based is indefinite in its meaning and application, and is not libelous *per se*, and does not, unless aided by an innuendo, apply to the court, nor reflect upon its integrity or purpose, and, in so far as any reflection upon the court is concerned, is capable of an innocent interpretation; and the defendant, in an answer sworn to by him, positively asserts that he used the language employed in the article in a meaning other than libelous, and with no intent to reflect upon either the integrity or honesty of purpose of the judge, or to embarrass or impede the administration of justice, such answer will be taken as conclusive.

ERROR to the district court for Douglas county. Tried below before SCOTT, J.

The opinion contains a statement of the case.

Edward W. Simeral and *E. R. Duffie*, for plaintiff in error:

Comment upon past proceedings is not contempt. (*Storey*

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v. People, 79 Ill., 45; *Cheadle v. State*, 11 N. E. Rep. [Ind.], 426; 16 Am. & Eng. Ency. Law, 495.)

The language was not *per se* libelous. (13 Am. & Eng. Ency. Law, 391.)

Constructive contempt being a summary proceeding, the language used must apply directly to the court or judge; and if, in order to make it apply to the judge, resort must be had to innuendo and the same is denied in the answer, contempt does not lie. The answer must be taken as true. (*Fishback v. State*, 30 N. E. Rep. [Ind.], 1088; *Cheadle v. State*, 11 N. E. Rep. [Ind.], 426.)

A. S. Churchill, Attorney General, and *W. S. Summers*, Deputy Attorney General, for the state.

HARRISON, J.

In this case the plaintiff in error was proceeded against for contempt, resulting in his conviction and sentence. It appears that there were two trials or hearings, a judgment of conviction and sentence upon the first being set aside upon motion of plaintiff in error, and a new hearing awarded. It is stated that the affidavit or complaint,—the basis of the first trial or hearing of the proceedings,—differed from the one upon which there was a final hearing; but however this may be, the complaint which was presented here as containing the charge of which plaintiff in error was convicted is as follows:

“Comes now J. L. Kaley, county attorney in and for the county of Douglas and state of Nebraska, and in the name of the state of Nebraska gives the court to understand and be informed, who, being sworn, on his oath says that Washington D. Percival, on or about the 9th day of March, 1894, in the county aforesaid, then and there wrongfully, unlawfully, and maliciously, for the purpose and with the intent of bringing the district court in and for the county of Douglas and state of Nebraska, and then and there being presided over by Judge C. R. Scott, one

of the judges of said district court, into disrepute and ridicule and to cause the people to have a contempt for said court, and for the purpose of causing it to be believed that said court was corrupt and influenced by corrupt motives, and for the purpose of destroying the integrity, honor, and efficiency of said court in the administration of public justice, and for the purpose of vilifying and traducing said court, and to thwart the due administration of justice in said court, and with the intent willfully to obstruct the proceedings and hinder the due administration of justice in a suit then and there and therein pending before said court, to-wit, the cause of the State of Nebraska v. T. T. Jardine, and then and there being undisposed of in said court, then and there wrote and published, and caused to be published, in the Omaha *Evening Bee*, being a daily newspaper published in the city of Omaha on said 9th day of March, 1894, and of general and extensive circulation and being generally read in said city of Omaha and in the county of Douglas and fourth judicial district of the state of Nebraska, and throughout the state of Nebraska in which said court presided over by said Judge C. R. Scott, then and there being the criminal section of the said district court, and was and is one of the courts of said judicial district, of and concerning said court the following false, scandalous, contemptuous, and defamatory matter, that is to say: 'Justice Without Equality.—Sentences Adjusted to Fit the Men.—One Party to a Crime Gets a Five-Year Sentence in the Penitentiary, While Another Gets the Benefit of a Pull. Persons who were around the criminal section of the district court yesterday afternoon witnessed a striking illustration of what it is to be possessed of a pull. The same persons were also given an illustration of how easy it is for a man to keep out of the penitentiary if the pull is worked for all it is worth,' intending then and there and thereby wrongfully, unlawfully, and contemptuously to cause it to be be-

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lieved that said court presided over by said Judge C. R. Scott was corrupt and influenced by corrupt motives."

After some preliminary pleas were filed on behalf of plaintiff in error and heard and disposed of by the court, and an affidavit in the nature of an answer, which was verified positively, was filed for the party charged, in which he denied that he wrote, or caused to be written or published, the following portion of the article quoted in the information, viz.: "Justice Without Equality.—Sentences Adjusted to Fit the Men.—One Party to a Crime Gets a Five-Year Sentence in the Penitentiary, While Another Gets the Benefit of a Pull," but admitted that he wrote the remainder of the article set forth in the information, which was as follows: "Persons who were around the criminal section of the district court yesterday afternoon witnessed a striking illustration of what it is to be possessed of a pull. The same persons were also given an illustration of how easy it is for a man to keep out of the penitentiary if the pull is worked for all it is worth," and it does not appear, and is not shown, that plaintiff in error was the author or caused to be published any more of the article alleged in the complaint than the portion the authorship of which he admitted in his answer. We then have here a charge of not direct, but constructive contempt alleged to have been committed by the writing and publication of such admitted portion of the article. It is contended by counsel that the portion of the article written or published, or caused to be published, by the plaintiff in error, did not constitute a contempt of court. In section 669 of the Code of Civil Procedure, under the head of "Contempt," it is provided: "Every court of record shall have power to punish by fine and imprisonment, or by either, as for criminal contempt, persons guilty of * * * Fourth—Any wilful attempt to obstruct the proceedings, or hinder the due administration of justice in any suit, proceedings, or process pending before the courts."

In 2 Bishop, Criminal Law, 259, it is stated: "By the commonly accepted doctrine, any publication, whether by parties or strangers, relating to a cause in court, tending to prejudice the public as to its merits, and to corrupt or embarrass the administration of justice,—or reflecting on the tribunal or its proceedings, or on the parties, the jurors, the witnesses, or the counsel,—may be visited as a contempt." It has also been said that the power to punish for contempt "is inherent in courts of justice, necessary for self-protection and an essential auxiliary to the pure administration of the law." (*People v. Wilson*, 64 Ill., 195, 16 Am. Rep., 542.) These are general rules, and we will now turn to some which, though general, are more specifically applicable to the facts and circumstances as developed in the case at bar. The general rule is that to constitute any publication a contempt, it must have reference to a matter then pending in court and be of a character tending to the injury of pending proceedings upon it, and of the subsequent proceeding. (*Rapalje*, Contempt, sec. 56; 2 Bishop, Criminal Law, sec. 262; *Fishback v. State*, 30 N. E. Rep., [Ind.], 1088; *State v. Sweetland*, 54 N. W. Rep. [S. Dak.], 415.) The plaintiff in error, in his answer, denied that he used the words in the portion of the article written by him which is set forth in the complaint with intention to cast upon either the court or its officers any imputation or charge of corruption or lack of integrity, and with intent to embarrass or impede the administration of justice. "If the article is *per se* libelous, making a direct charge against the court or jury, admitting of but one fair and reasonable construction, and requiring no innuendo to apply its meaning to the court, then it would be trifling with justice to say that the publisher could admit the publication and deny that he intended the plain and unmistakable meaning which the language used conveys; but when the language used in an article is not *per se* libelous, and only becomes so and made to apply to the court by the

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use of innuendoes, and if fairly susceptible of an innocent meaning so far as any reflection upon the court is concerned, and defendant answers under oath that he used it in a sense not libelous and declares he intended no imputation upon the court, either impugning the motives or integrity of the judge or to embarrass the administration of justice, his answer must be taken as conclusive." (*Cheadle v. State*, 11 N. E. Rep., 426; *Fishback v. State*, *supra*.) We think the above rule a correct one. The language of the portion of the article proved or admitted by the plaintiff in error to be his production (we will quote it again), "Persons who were around the criminal section of the district court yesterday afternoon witnessed a striking illustration of what it is to be possessed of a pull. The same persons were also given an illustration of how easy it is for a man to keep out of the penitentiary if the pull is worked for all it is worth," cannot be said, upon its face and without an innuendo, to apply or refer to the court proper or its officers, or to jurors or witnesses, or to one more than another, or to be libelous *per se*, or that it clearly charges, as is stated in the complaint, that the court was corrupt and influenced by corrupt motives, or to so charge with reference to any particular person or persons, or to any one more than another. It cannot be said, upon its face, to refer to any case pending at the time it was written and published or to any designated case. In its terms it deals with some past transaction or proceedings. The phrase "possessed of a pull" is, to speak strictly, without an intelligible meaning, and is, in any event, so doubtful and uncertain that it cannot be applied as imputing that the court was corrupt as is claimed in the complaint, with any greater certainty than it may be said to refer to some other person or persons or to actions or motives erroneous and improper, but not corrupt. The portion of the article admitted and proved to be the work of plaintiff in error and the proof made were insufficient to support a charge

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and conviction of contempt and sentence therefor. (*State v. Sweetland, supra.*) We desire to state that we are only herein passing upon the portion of the article admitted or proved in the present case to have been penned by the plaintiff in error, and that no other parts of the article with which this seems to have been connected have been considered, nor has the probable effect or meaning of the portion herein involved been contemplated when read in connection and as a part of the whole article. It follows from the views herein expressed that the judgment of the district court must be

REVERSED AND PLAINTIFF IN ERROR DISCHARGED.

IN RE BARBARA HAVLIK.

FILED SEPTEMBER 17, 1895. No. 6706.

1. **Habeas Corpus: REVIEW.** "Mere errors and irregularities in a judgment or proceeding of a court in a criminal case under and by virtue of which a person is imprisoned, which are not of such a character as render the proceedings void, cannot be reviewed on an application for a writ of *habeas corpus*. That writ cannot operate as a writ of error." *In re Betts*, 36 Neb., 282; *State v. Crinklaw*, 40 Neb., 759, followed.
2. **Contempt: JURISDICTION: HABEAS CORPUS.** Where the law did not authorize contempt proceedings under and by virtue of which a party was imprisoned, there was a lack of jurisdiction and the judgment void and *habeas corpus* a proper remedy to obtain a release from imprisonment.
3. **Proceedings in Aid of Execution.** In proceedings in aid of execution, as provided for in sections 532 to 549, inclusive, of the Code, any property of the judgment debtor not exempt by law and in the hands of third persons may be ordered to be applied to the satisfaction of the judgment, and such order may be enforced by the ordinary legal methods of procedure.
4. — : **ORDERS: DISOBEDIENCE: CONTEMPT.** An order in pro-

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ceedings in aid of execution as provided for in the Code of Civil Procedure, to a third person to turn over property in his or her possession to be applied in discharge of the judgment, it disobeyed, cannot be enforced by imprisonment of the party so ordered, as for a contempt under section 546 of the Code.

ORIGINAL application for writ of *habeas corpus*. *Prisoner discharged*.

Reese & Gilkeson, W. B. Comstock, and H. A. Reese, for petitioner.

Simpson & Sornborger and Good & Good, contra.

HARRISON, J.

It appears from the record in this case that the National Bank of Wahoo obtained a judgment in the county court of Saunders county against Frank Havlik for the sum of \$567.34 and costs of suit, upon which execution was issued of date November 16, 1893, and delivered to an officer and was returned "no property found." On the day of the return of the execution the president of the bank filed with the court an affidavit in which it was stated, with other usual averments, that the defendant, or judgment debtor, was the owner of property not exempt under the law from being subjected to the payment of his debts, and which he concealed, and, upon application, an order was issued citing the debtor to appear and answer under oath such inquiries as might be made of him touching his property. The debtor appeared, and as a result of his examination it was concluded that Barbara Havlik, the petitioner herein, had in her possession and control three promissory notes of the aggregate sum of \$2,200, the property of the judgment debtor, and not exempt by law from being applied to the payment of his debts, and that they were placed in her hands for the purpose of hindering and delaying the bank in the collection of the amount due it, and in fraud of its rights in the premises, and thereupon a citation was served upon

Barbara Havlik commanding her to appear and answer concerning any property in her possession or under her control belonging to the judgment debtor. This citation she did not obey, and a bench warrant was issued and she was brought into court and questioned, and pursuant to the conclusions and findings of the court from the evidence elicited during her examination and that of Frank Havlik she was ordered to deliver into court, within ten days, the promissory notes, to be applied toward the payment of the bank's judgment. Of this order there was personal service, but she failed and refused to comply therewith, and a complaint was filed charging her with contempt of court in so failing and refusing to comply with the court's order, and, as a result of a hearing upon such complaint, she was adjudged guilty of a contempt and ordered to be confined in the jail of the county until she obeyed the order of the court in reference to the promissory notes, and, upon being imprisoned in the county jail, she applied to this court for a writ of *habeas corpus*, which was issued, and the sheriff of Saunders county has made return thereto and an issue of law has been joined.

It is stated in the applicant's petition, among other things, that the applicant has at all times insisted that the promissory notes in question were her property, and hence she declined to turn them over to the court to be applied in payment of the debts of Frank Havlik. There are two main questions raised and discussed in the case as presented here: One is, Is *habeas corpus* the proper remedy or should the applicant have appealed or prosecuted a writ of error from the decision of the sentencing court? And the other, Was the adjudication of the trial court void or was it only irregular or erroneous? The two are so connected that an answer to the latter will determine the disposition to be made of the former, for, if the judgment of the court, by virtue of which the applicant was committed to prison, was merely irregular or erroneous, then appeal or error was the proper remedy and it cannot be reviewed in a *habeas corpus*

proceeding. (*Ex parte Fisher*, 6 Neb., 309; *In re Betts*, 36 Neb., 283; *State v. Crinklaw*, 40 Neb., 759.) But if the judgment under which she was imprisoned was for any reason void, then *habeas corpus* was proper and she can be released in the present proceeding. "Where the proceedings are wholly void, because of want of jurisdiction of the court over the subject matter, or are illegal, as distinguishable from being merely erroneous, the writ of *habeas corpus* is an appropriate remedy. (*In re Betts*, 36 Neb., 282, and cases cited.)

The proceedings which resulted in the imprisonment of the applicant herein were instituted under the provisions of chapter 2, title 14, of the Code of Civil Procedure, designated "Proceedings in Aid of Execution," and more particularly sections 532, 538, 541, 546, and 547 thereof. (Code, title 14, ch. 2.) These sections provide for an examination of the debtor's debtor before the judge or a referee, and if from the information thus obtained the judge shall conclude that there is any money or property in the hands of the person or corporation examined due the judgment debtor, the judge "may order it to be applied toward the satisfaction of the judgment." The main intent and purpose of the provisions of the sections under the head of "Proceedings in Aid of Execution" is evidently the discovery of money or property of the judgment debtor liable to be applied toward the satisfaction of the indebtedness, and the order to the third person who was not a party to the original action, or to these summary proceedings, except as cited to appear and answer, if complied with, while it might operate a discharge of all claims by anyone against such person in regard to the moneys or property involved, yet where such third person claims ownership of the money or property his or her right cannot be fully concluded in the summary manner set forth in the chapter to which we have referred. The judge has a right to direct how the money or proceeds of

any property disclosed shall be applied, and the means of enforcing his directions must be through the ordinary processes of the law. In this case Barbara Havlik was not a party to the original action or the judgment resulting therefrom against Frank Havlik, and she claimed the credits or property which it was ordered should be applied to the satisfaction of the judgment against Frank Havlik as her own and refused, as she had a right to, to turn it over to be so applied, and she had a right to maintain her claim of ownership in any of the ordinary proceedings by law contemplated in and applicable to such circumstances and conditions, and there was no authorization of the enforcement of a compliance with the order on her part by her imprisonment in contempt proceedings. These sections of our Code, with some few exceptions which are unimportant so far as any bearing upon the question herein is concerned, are also embodied in the Code of the state of Ohio and have been construed by the supreme court of that state and support the views herein expressed. (See *Union Bank of Rochester v. Union Bank of Sandusky*, 6 O. St., 254; *Edgerton v. Hanna*, 11 O. St., 323; and see, also, *Estey v. Fuller Implement Co.*, 47 N. W. Rep. [Ia.], 1025; 2 Freeman, Executions, sec. 405; *West Side Bank v. Pugsley*, 12 Abb. Pr., n. s. [N. Y.], 28.) The law not authorizing or warranting the imprisonment of the applicant herein for non-compliance with the order made, or her punishment as for contempt, the court or judge had no jurisdiction to adjudge her to be imprisoned, and the judgment in the contempt proceedings was void and *habeas corpus* the proper remedy. (See citations hereinbefore made in support of the rule. See, also, *Spelling*, Extraordinary Relief, secs. 1202-1243, pp. 988-1025; *People v. Kelly*, 24 N. Y., 74; Freeman, Judgments, sec. 624.) It follows that the demurrer to the application for the writ must be overruled and the

PETITIONER DISCHARGED.

STATE OF NEBRASKA, EX REL. FRANK SHAFFER, v.
HENRY E. BOWMAN ET AL.

FILED SEPTEMBER 17, 1895. No. 4160.

Mandamus. A writ of *mandamus* will issue only when the right to require the performance of the desired act is clear.

ORIGINAL application for *mandamus*. *Writ denied.*

William Leese and *F. B. Beall*, for relator.

C. C. Flansburg and *J. G. Thompson*, *contra*.

RYAN, C.

This application for a *mandamus* was filed April 8, 1890. The relator in his petition alleged that the city of Alma in the year 1890 was a city of the second class, containing more than one thousand inhabitants; that said city was made up of three wards; that on the first Tuesday of April, 1890, the relator was a candidate for the office of councilman of the first ward and received the same number of votes as did the candidate opposing him; and that the respondents, who were judges of the election in the said ward, had duly delivered to the city clerk of Alma the ballots cast and poll books used in said first ward election without having previously determined by ballot which candidate should serve as councilman from the first ward. The prayer was for a writ of *mandamus* requiring the respondents to assemble forthwith and determine the aforesaid tie vote by ballot and certify the result to the city clerk and council of said city. By their answer filed October 2, 1891, the respondents alleged that they had never been requested to determine the said tie vote until the poll books and ballots had passed out of the hands of themselves as election judges. We have been cited to no statute which in terms

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makes provision for the above contingency. Section 45, chapter 26, Compiled Statutes, provides that where the tie is between two persons who are candidates for a township office the clerk shall notify both to appear at his office at a given time to determine the same by lot before the board and that the certificate of election shall be given accordingly. If the above proceedings prescribed by the chapter entitled "Elections" are by analogy to be deemed applicable to elections in cities of the class to which Alma belongs, as probably they should be, the petition should have stated that the city clerk had taken the step above indicated before a decision could be required by lot, and, even then, the general powers of the judges of election would not so nearly correspond to those of the board as would the powers of the city council. The writ is denied.

WRIT DENIED.

PAUL H. LEADER ET AL., APPELLEES, V. M. M. TIERNEY ET AL., APPELLANTS.

FILED SEPTEMBER 17, 1895. No. 6165.

Trusts: ACTIONS TO ENFORCE. A party who had furnished means to pay for an interest in real property purchased for certain parties contributing thereto and of which, for convenience, the title had been taken in the name of one investor for the benefit of all contributors, is entitled to maintain an equitable action for the enforcement of the trust which, by reason of the foregoing facts, had arisen in his favor against said associate holding title.

APPEAL from the district court of Dakota county. Heard below before NORRIS, J.

J. J. McAllister and Argo, McDuffie & Argo, for appellants.

R. E. Evans and Jay & Beck, contra.

RYAN, C.

This action was brought in the district court of Dakota county by the appellees to compel M. M. Tierney to convey to appellees certain lots, which, it was alleged, had been purchased and paid for by said appellees and said Tierney jointly. It was alleged that, for convenience in making conveyances of said lots, the title was taken in the name of M. M. Tierney, who had not only refused to execute conveyances to appellees as his trust relation required, but had conveyed some of the lots to John H. Burke, and some to Laura A. Tierney, in disregard of the rights of the appellees. The two individuals last named were joined as defendants, and as against their claims it was averred that they were not *bona fide* purchasers, and held such interests as they had subordinate to the rights of the appellees. The appellants, in effect, denied each of the allegations of the petition, and themselves in their own individual rights prayed that title might be decreed in their favor. By reply the averments of the answer were denied and, upon a trial, these issues were found in favor of the appellees. It is urged that the agreement alleged in the petition is within the statute of frauds, and that, therefore, the appellees, though they may have furnished the means for making payment of one-third of the purchase price, are remediless, because the subject-matter was real property, and of the trust there exists no written evidence. Section 3, chapter 32, Compiled Statutes, provides: "No estate or interest in land, other than leases for a term not exceeding one year, nor any trust or power over or concerning lands, or in any manner relating thereto, shall hereafter be created, granted, assigned, or surrendered, or declared, unless by act or operation of law, or by a deed of conveyance in writing, subscribed by the party creating, granting, assigning, sur-

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rendering, or declaring the same." In the sections immediately following the above it is provided that the above section shall not be construed to prevent the arising of any trust by operation of law. In *Carter v. Gibson*, 29 Neb., 324, it was held that a trust, though not created by such an instrument as would be requisite to convey an interest in real property, was not within the inhibition of the above sections and could be enforced. The construction given the above sections equally applies to the case at bar. There is no theory upon which the testimony of one party can be harmonized with that of the other. Evidently the district court rejected the testimony of appellants, and the proofs, under such circumstances, were as clear and satisfactory as were required in *Robinson v. Jones*, 31 Neb., 20. The judgment of the district court is

AFFIRMED.

HENRY WORTENDYKE V. GEORGE E. SALLADIN.

FILED SEPTEMBER 17, 1895. No. 5910.

Fraudulent Conveyances: Insolvent Corporations: Preference in Favor of Stockholder. Where the holder of stock of an insolvent corporation, just before its final suspension of business, obtained assignments to himself of such an amount of the corporation's bills receivable as to fully secure claims owing to such stockholder and a partnership firm of which he was a member, leaving almost no assets for the payment of the other creditors of the corporation, the intent with which such preference was made and received was a question of fact for the jury, and its verdict upon proof of the above facts, that such preference was fraudulent as against creditors of the corporation, will not be disturbed as unwarranted in fact or in law.

ERROR from the district court of Seward county. Tried below before BATES, J.

G. M. Lambertson, for plaintiff in error:

A failing bank has the right both to borrow money and to give security for the payment thereof, and may also secure creditors for antecedent debts if done in good faith. (*Hershiser v. Higman*, 31 Neb., 534; *Davis v. Scott*, 22 Neb., 154; *Bierbower v. Polk*, 17 Neb., 278; *Ward v. Parlin*, 30 Neb., 376; *Brown v. Williams*, 34 Neb., 376; *Kavanaugh v. Oberfelder*, 37 Neb., 647.)

A stockholder who has a deposit in the bank, subject to check, may, in consideration of not withdrawing the deposit, take security for the payment thereof. (*Twin-Lick Oil Co. v. Marbury*, 91 U. S., 589; *Omaha Hotel Co. v. Wade*, 97 U. S., 13; *Santa Cruz R. Co. v. Spreckles*, 65 Cal., 193; *Hallam v. Indianola Hotel Co.*, 56 Ia., 178; *Duncombe v. New York, H. & N. R. Co.*, 88 N. Y., 1; *Borland v. Haven*, 37 Fed. Rep., 406.)

The court in giving the seventh instruction asked by defendant that a stockholder could loan money to a bank and take security for payment, and in giving the seventh instruction asked by plaintiff that such a loan was void if the intention was also to obtain security for other money due him, had a tendency to confuse and mislead the jury. (*McCleneghan v. Omaha & R. V. R. Co.*, 25 Neb., 523; *Wasson v. Palmer*, 13 Neb., 376; *Fitzgerald v. Meyer*, 25 Neb., 77; *School District v. Foster*, 31 Neb., 501.)

R. S. Norval and R. P. Anderson, contra.

RYAN, C.

The Northwestern Banking Company was, from the year 1884 till January 29, 1889, engaged in the business of banking at Milford, in Seward county. There was no copy of its articles of incorporation filed in the office of the county clerk of said county, though during the entire interval of time above indicated this company did business as, and

claimed to be, a corporation. The decision of this case does not require us to give great weight to this omission and the company will therefore be treated as though incorporated in exact compliance with the statutes of this state. Henry Wortendyke, the plaintiff in error, was an owner of a small amount of the company's capital stock on January 28, 1889. Mr. Emerson, the company's general manager, on that day said to Mr. Wortendyke that there was a run on the bank and that it was short of currency. It was then arranged between these two persons that Mr. Wortendyke should borrow a thousand dollars at Seward for the use of the banking company. For this purpose he proceeded to Seward and borrowed on his own credit the sum of \$2,000. One-half of this he left in the bank at the place last named, and with the other half, between 10 and 11 o'clock in the forenoon of January 29, 1889, he returned to Milford. The amount left at Seward seems for the most part, if not altogether, to have been drawn out upon the checks of Mr. Wortendyke in payment of deposits owing by the banking company. It is not disclosed what was done with the cash brought by Mr. Wortendyke to Milford in the forenoon of January 29, aforesaid, but it is very certain that in the afternoon of that day the banking company ceased to do business. A few days thereafter Mr. Salladin became its assignee and in that capacity brought this action, the occasion and nature of which we shall now describe.

At the time that Mr. Wortendyke went to Seward he was associated, as a partner in the insurance business, with Richard Spelts. The style of this firm was Wortendyke & Spelts, and on January 28, 1889, it had a deposit with the banking company to the amount of about \$430. Mr. Wortendyke's deposit with the same banking company was to the amount of \$212.50. To indemnify Mr. Wortendyke in respect to the money borrowed by him at Seward, and to secure the above deposits, Mr. Emerson transferred

to Mr. Wortendyke notes held by the banking company to the amount of \$3,500. When the assignee shortly afterward took possession of the assets of the banking company, it was found that they amounted to but little over \$2,000, while its liabilities, as it has since transpired, exceeded \$20,000. This action was brought by the assignee to recover from Mr. Wortendyke \$2,475, which it was alleged was the amount of the collaterals which Mr. Wortendyke had, upon demand, wrongfully refused to pay to said assignee. The theory upon which this was claimed was that Mr. Wortendyke, a stockholder of the banking company, by means of a fraudulent arrangement with the general manager, had secured possession of a large part of its assets, and, with intent to defraud its depositors and other creditors, had wrongfully converted the aforesaid amount thereof to his own use. In his answer Mr. Wortendyke averred that of the sum he had borrowed at Seward he had turned over to the banking company \$1,644, which had been used to pay its depositors; that he had retained \$213, which the banking company owed him as depositor, and the sum of \$431.15, likewise a deposit, which was due Wortendyke & Spelts, and that he had paid out \$186 as attorney's fees and other expenses of collecting the aforesaid notes. There was a reply in denial of each of these allegations of the answer. A trial was had of the above issues to a jury, which returned a verdict in favor of the assignee for the sum of \$700, upon which judgment was duly rendered. This was on March 17, 1892. This verdict was for less than the aggregate amount of the deposits of Wortendyke & Spelts and Mr. Wortendyke, with seven per cent thereon computed from January 29, 1889. Upon consideration of the entire evidence we see no reason for reversing the judgment of the district court whereby the verdict was sanctioned.

In respect to the money borrowed for and used by the bank to tide over an emergency the language of Mr. Jus-

tice Miller in *Twin-Lick Oil Co. v. Marbury*, 91 U. S., 589, was perhaps applicable. This language, quoted with approval in *Gorder v. Plattsmouth Canning Co.*, 36 Neb., 548, was as follows: "While it is true that the defendant, as a director of the corporation, was bound by all those rules of conscientious fairness which courts of equity have imposed as the guides for dealing in such cases, it cannot be maintained that any rule forbids one director among several from loaning money to the corporation when the money is needed, and the transaction is open and otherwise free from blame. No adjudged case has gone so far as this. Such a doctrine, while it would afford little protection to the corporation against actual fraud or oppression, would deprive it of the aid of those most interested in giving aid judiciously and best qualified to judge of the necessity of that aid, and of the extent to which it may safely be given." These considerations, however, have no applicability to such deposits as were due Wortendyke & Spelts and Mr. Wortendyke when the latter, just before the banking company suspended business, obtained collateral security for the full amount in which, as a creditor, he was in any way interested. Whether or not the preference was fraudulent was a question of fact for the jury, and with its verdict in the light of the evidence we find no cause for complaint by the plaintiff in error. The seventh instruction given by the court was a fair statement of the rule which should govern the jury in considering the effect of taking security for the deposits hereinbefore referred to, and the criticism of this instruction cannot receive our sanction.

Instructions numbered 3, 6, and 7, asked by the plaintiff and given, are in gross assailed by one assignment, which questions the correctness of the general rule hereinbefore held applicable to the security taken for the deposit due from the banking company to Mr. Wortendyke and to Wortendyke & Spelts. An extended review of these instructions is therefore unnecessary.

Ringwalt v. Wabash R. Co.

The refusal of the court to give instructions requested by the defendant numbered 1, 2, 3, 4, 5 is called in question by a single assignment. The rules of law applicable to this case, and embodied in the instructions which were numbered 4 and 5, were by the court upon its own motion stated to the jury as favorably as the defendant was entitled to have them stated, hence this assignment must be disregarded. There is found no error in the record and the judgment of the district court is

AFFIRMED.

NORVAL, C. J., not sitting.

MARY C. RINGWALT v. WABASH RAILROAD COMPANY
ET AL.

FILED SEPTEMBER 17, 1895. No. 6142.

1. **CARRIERS: LIABILITY FOR BAGGAGE OF PASSENGERS.** A common carrier undertaking to transport the baggage of its passengers is held by the law to the strictest accountability; and if the carrier receives such baggage, and undertakes its carriage, it cannot be relieved from liability therefor by anything save the act of God or the public enemy; but a carrier is not liable for the baggage of its passenger unless the evidence shows that the baggage claimed to be lost and sued for came into the possession of the carrier.
2. ———: ———: **EVIDENCE.** R. purchased from the Wabash Railroad Company at Omaha, Nebraska, a ticket from that place to Lexington, Kentucky. In making the journey according to the terms of the ticket R. traveled first over a line of the Union Pacific Railway Company, then over a line of the Wabash Railroad Company, thence over the lines of other carriers to Lexington. On the afternoon of the day she began her journey from Omaha, R. placed her jewelry in her trunk, locked it, and delivered it to a drayman, by whom it was transported from her residence to the depot of said Union Pacific Railway Company, whose agent then accepted the trunk and checked it through to Lexington. The last carrier, at its depot in Lexington, deliv-

ered the trunk to a drayman, who hauled it to R.'s residence where it was opened, and R. then discovered that her jewelry was missing. The trunk bore no indication of having been opened or tampered with. In a suit by R. against the Wabash Railroad Company for the value of said jewelry, *held*, (1) that the trunk while in the possession of the draymen at Omaha and Lexington was in the possession of R.'s agents; (2) that until some evidence was introduced showing the trunk was not opened nor tampered with while in the possession of said draymen the presumption would not arise that the jewelry was lost from the trunk while in the possession of any of the said railroad companies.

ERROR from the district court of Douglas county. Tried below before KEYSOR, J.

Morris & Beekman, for plaintiff in error, cited: *Candee v. Pennsylvania R. Co.*, 21 Wis., 587; *Illinois Central R. Co. v. Copeland*, 24 Ill., 332; *Gray v. Jackson*, 51 N. H., 9; *Morse v. Brainerd*, 41 Vt., 550; *Root v. Great Western R. Co.*, 45 N. Y., 524; *Atchison, T. & S. F. R. Co. v. Roach*, 35 Kan., 740; *Hill Mfg. Co. v. Boston & L. R. Co.*, 104 Mass., 122; *Ohio & M. R. Co. v. McCarthy*, 96 U. S., 258; *Peet v. Chicago & N. W. R. Co.*, 19 Wis., 119; *Ogdensburg & L. C. R. Co. v. Pratt*, 22 Wall. [U. S.], 123; *Texas & P. R. Co. v. Fort*, 9 Am. & Eng. R. Cases [Tex.], 392; *Texas & P. R. Co. v. Ferguson*, 9 Am. & Eng. R. Cases [Tex.], 395; *Louisville, N. A. & C. R. Co. v. Nicholai*, 30 N. E. Rep. [Ind.], 424; *Beard v. St. Louis, A. & T. H. R. Co.*, 79 Ia., 528; *Evansville & C. R. Co. v. Androscoggin*, 89 U. S., 594.

John L. Webster, contra, cited: 2 Beach, Railways, sec. 906; *Kessler v. New York C. & H. R. R. Co.*, 61 N. Y., 538; *Montgomery & E. R. Co. v. Culver*, 75 Ala., 587; *Michigan C. R. Co. v. Mineral Springs Mfg. Co.*, 16 Wall. [U. S.], 318; *Croft v. Baltimore & O. R. Co.*, 1 McA. [D. C.], 492; *Kerrigan v. Southern P. R. Co.*, 81 Cal., 248; *Myrick v. Michigan C. R. Co.*, 107 U. S., 107.

RAGAN, C.

In April, 1890, Mrs. Mary C. Ringwalt purchased of the Wabash Railroad Company at Omaha, Nebraska, a railroad ticket from that city to Lexington, Kentucky. In the journey on the ticket Mrs. Ringwalt traveled over the line of the Union Pacific Railway Company from Omaha to Council Bluffs, Iowa; from Council Bluffs, Iowa, to St. Louis, Missouri, over the lines of the Wabash Railroad Company and the Omaha & St. Louis Railroad Company; from St. Louis, Missouri, to Cincinnati, Ohio, over the line of the Ohio & Mississippi Railroad Company; and from Cincinnati, Ohio, to Lexington, Kentucky, over the line of the Cincinnati Southern Railway Company. On the day that Mrs. Ringwalt left the city of Omaha to make her journey she delivered her trunk, containing certain articles of personal property, to the Wabash Railroad Company for transportation as baggage to Lexington. The delivery of the trunk was made to the Wabash Railroad Company by delivering it to the Union Pacific Railway Company at its depot in the city of Omaha, the first carrier over whose line of road Mrs. Ringwalt would travel in making her journey according to the terms of her ticket. The agent of the Union Pacific Railway Company examined the ticket held by Mrs. Ringwalt, punched the same, accepted the trunk or baggage of Mrs. Ringwalt, and checked the same through to Lexington, delivering at the same time to Mrs. Ringwalt the ordinary railroad check or receipt used by common carriers in this country, and the production of which at Lexington would authorize the delivery of the trunk to the holder of said check or receipt. Mrs. Ringwalt brought this suit in the district court of Douglas county against the Wabash Railroad Company to recover the value of certain jewelry belonging to her and which she alleges was in said trunk when it was accepted and checked by the Wabash Railroad

Company, and which jewelry was stolen from said trunk while in transit between the cities of Omaha, Nebraska, and Lexington, Kentucky. At the close of the evidence the jury, in obedience to an instruction of the district court, returned a verdict in favor of the Wabash Railroad Company, and to reverse the judgment of dismissal entered upon this verdict against her Mrs. Ringwalt has prosecuted to this court a petition in error.

There are a number of interesting and important legal questions extensively discussed in the briefs of counsel for the respective parties to this case, but an examination of these questions becomes unnecessary in view of the fact that we have reached the conclusion that the judgment of the district court must be sustained solely on the ground that the evidence in the record is insufficient to sustain a finding and judgment against the Wabash Railroad Company for the property sued for. The evidence is that the jewelry was placed in the bottom of the trunk by Mrs. Ringwalt at her residence, or where she was stopping, in the city of Omaha, about 3 o'clock in the afternoon; that the trunk was locked and sent by an expressman or drayman to the Union Pacific depot, where it was checked about 4 o'clock in the afternoon of the same day. The trunk appears to have reached Lexington, Kentucky, late in the afternoon and was taken from the depot of the carrier last transporting it to the residence or stopping place of Mrs. Ringwalt in Lexington by an expressman or drayman. In the night of the arrival of said trunk Mrs. Ringwalt opened the same and then discovered that the jewelry sued for was missing. The condition of the trunk was apparently in all respects the same when received by Mrs. Ringwalt in Lexington that it was when she started it from Omaha. The lock of the trunk had not been broken, nor had the trunk been opened, so far as could be ascertained.

We assume for the purposes of this case the competency of the Wabash Railroad Company to enter into a contract

with Mrs. Ringwalt to transport herself and baggage from the city of Omaha, Nebraska, to Lexington, Kentucky, and that the Wabash Railroad Company would be liable to Mrs. Ringwalt for any default in the performance of such contract. We also assume that the Union Pacific Railway Company, in all that it did towards the transporting of Mrs. Ringwalt on the ticket she held from Omaha to Council Bluffs, and in accepting, checking, and forwarding her trunk or baggage was acting for and on the behalf of the Wabash Railroad Company; and if the evidence would support a finding that the jewelry sued for in this action was in the trunk of Mrs. Ringwalt at the time the trunk was accepted and checked by the agent of the Union Pacific Railway Company at the depot in Omaha, by virtue of the ticket held by Mrs. Ringwalt, and if the evidence would support the further finding that said jewelry was not in said trunk at the time it was delivered to Mrs. Ringwalt by the last carrier at Lexington, then we have no doubt as to the accountability of the Wabash Railroad Company to Mrs. Ringwalt for the value of said jewelry. There is, however, a lack of evidence to show that the jewelry sued for was in the trunk when checked at the Union Pacific depot at Omaha, Nebraska. Had the expressman or drayman who hauled the trunk from the residence of Mrs. Ringwalt to the depot at Omaha been called and testified that he transported the trunk to the depot and delivered it to the agent there in the same condition in which he received it, we think that this would have been sufficient evidence to sustain a finding that the trunk when delivered to the Wabash Railroad Company contained the jewelry sued for. A common carrier undertaking to transport the baggage of its passenger is held by the law to the strictest accountability; and if the carrier receives such baggage and undertakes its carriage, it cannot be relieved from liability therefor by anything save the act of God or the public enemy; but while the law holds the carrier to this rigid

accountability, we know of no rule of law that will render a carrier liable for the baggage of a passenger unless the evidence shows that the baggage sued for came into the possession of the carrier.

There is one thing further to be said of this judgment. If we should hold that the evidence is sufficient to support a finding that the jewelry sued for was in the trunk of Mrs. Ringwalt when it was accepted for transportation by the Wabash Railroad Company at Omaha, still there is no evidence which shows or tends to show that this trunk may not have been opened and the jewelry abstracted from it after it was delivered by the last carrier at Lexington to the expressman or drayman who transported it from the depot there to the stopping place of Mrs. Ringwalt. The Wabash Railroad Company cannot be held liable to Mrs. Ringwalt for this jewelry on mere conjectures. The law does not presume that the expressman who hauled the trunk from Mrs. Ringwalt's residence in Omaha, Nebraska, to the depot there opened the trunk and stole the jewelry. It does not presume that the agent or servants of any of the carriers between Omaha and Lexington opened the trunk and stole the jewelry, or that the jewelry was stolen by the drayman in Lexington who transported the trunk from the depot at that place to the residence of Mrs. Ringwalt. The law presumes dishonesty in no man, and to hold the Wabash Railroad Company liable in this action on the evidence in this record would be to indulge the presumption of honesty on the part of the draymen at Omaha and Lexington and dishonesty on the part of the servants of the railroad carriers. If the evidence in the record before us showed affirmatively that the trunk was not opened nor tampered with between the house of Mrs. Ringwalt and the Union Pacific Railway depot at Omaha, and that the trunk was not opened nor tampered with from the time it was delivered to the agent of Mrs. Ringwalt at the last carrier's depot at Lexington until it reached the hands of Mrs. Ringwalt, the

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case would be entirely different and the liability of the Wabash Railroad Company for the property fixed; but the trunk while in the possession of the drayman at Omaha and in the possession of the drayman at Lexington was in the hands of the agents of Mrs. Ringwalt, and the presumption will not arise that the jewelry was lost or stolen while in the possession of the Wabash Railroad Company until she produces such evidence as will sustain a finding that the jewelry was in the trunk when it was accepted by the Wabash Railroad Company for carriage, and that the trunk had not been opened nor tampered with from the time it was delivered by the last carrier to her agent in Lexington until she opened it and found the jewelry missing. For the sole reason that the evidence will not support such findings the judgment must be and is

AFFIRMED.

GRANT GUTHRIE ET UX. V. HAMILTON LOAN & TRUST
COMPANY.

FILED SEPTEMBER 17, 1895. No. 6261.

Usury. The facts in this case are substantially the same as those in *Upton v. O'Donahue*, 32 Neb., 565, and *Pierce v. Davey*, 43 Neb., 45. On the authority of those cases the decree of the district court in this action is affirmed.

ERROR from the district court of Sioux county. Tried below before BARTOW, J.

Grant Guthrie, for plaintiffs in error.

Wharton & Baird and *H. I. Conley*, contra.

Erskine v. Swanson.

RAGAN, C.

The facts in this case are substantially the same as those in *Upton v. O'Donahue*, 32 Neb., 565, and *Pierce v. Davey*, 43 Neb., 45. On the authority of those cases the decree of the district court in this action is

AFFIRMED.

N. N. ERSKINE V. KNUTE SWANSON ET AL.

FILED SEPTEMBER 17, 1895. No. 6398.

1. **Sales: WARRANTY.** To constitute a warranty it is not necessary that the word "warranty" should be used. It is sufficient if the language used by the vendor amounts to an undertaking or an assertion on his part that the thing sold is as represented. *Patrick v. Leach*, 8 Neb., 530, and *Little v. Woodworth*, 8 Neb., 281, followed.
2. ———: ———: **EVIDENCE: QUESTION FOR JURY.** Whether statements made by a vendor as to the condition or quality of property offered for sale were intended by him to be warranties of the condition or quality of such property, or whether by such statements the vendor intended merely to give his opinion as to the condition or quality of such property, are questions of fact for a jury. *Halliday v. Briggs*, 15 Neb., 219, followed.
3. **Estoppel: SALES: WARRANTY.** If a vendor of property knows that representations made by him as to the soundness or condition of the property sold are regarded by his vendee as warranties on the part of the vendor and believed in, relied, and acted upon as such by the vendee, then the vendor is estopped from asserting that such representations were not warranties.

ERROR from the district court of Antelope county. Tried below before KINKAID, J.

O. A. Williams, for plaintiff in error, cited: 1 Thompson, Trials, secs. 1198, 1205, 1207; *Halliday v. Briggs*,

15 Neb., 221; Newmark, Sales, secs. 318, 320; *Wallace v. Wren*, 32 Ill., 148; *Chandler v. Lopus*, 4 Croke [Eng.], 4.

J. F. Boyd, and *J. S. Robinson*, *contra*, cited: *Little v. Woodworth*, 8 Neb., 284; *Patrick v. Leach*, 8 Neb., 536.

RAGAN, C.

N. N. Erskine sued Knute Swanson and others in the district court of Antelope county on a promissory note. The note was given Erskine by Swanson and others in part payment of a stallion purchased by the latter of Erskine. The Swansons pleaded as defenses to the action that at the time of the purchase of the stallion and the execution of the note Erskine represented to them that the stallion was free from all defects except a small bunch on one hind foot, which Erskine stated was caused from the foot having been stepped upon, and "that the bunch was not a permanent one," and that he, Erskine, would warrant the stallion's recovery from said defect within thirty to sixty days; that Erskine further warranted said stallion to be a sure foal getter; that they, to the knowledge of Erskine, were desirous of purchasing a stallion for breeding purposes; that they relied upon the representations as to the condition and quality of the stallion made by Erskine, and purchased him in consequence of such representations, and their belief in their truth; that the representations were false; that the "bunch" on the foot of the stallion was not caused by his having been stepped upon, but was a "ring bone," from which the stallion never recovered, and which rendered him lame, unfit for service, and worthless, and that he was not a sure foal getter. The Swansons had a verdict and judgment, and Erskine has prosecuted to this court a proceeding in error.

To reverse the judgment of the district court counsel for Erskine urge upon us three arguments:

1. That the evidence does not establish a warranty. We

think it does. The evidence is undisputed that at the time of the sale of the horse he was lame in the left hind foot; and the evidence on behalf of the Swansons is that on their making inquiries of Erskine as to the cause of the lameness Erskine said that he had had the horse shod shortly before and that he had corked himself; "You needn't be afraid of that lameness. I guaranty that horse. In a few weeks you won't notice it." "Why, the horse will be all right. I guaranty to you it will be all right." "He is a good, sure horse." The testimony on behalf of Erskine is to the effect that he told the Swansons that the horse had become lame after he was shod, and that he gave it as his opinion that the hoof was pared a little too much, that the horse's leg had become strained, and that in his opinion the horse would be all right in a little while. To constitute a warranty it is not necessary that the word "warrant" should be used. It is sufficient if the language used by the vendor amounts to an undertaking or assertion on his part that the thing sold is as represented. (*Patrick v. Leach*, 8 Neb., 530; *Little v. Woodworth*, 8 Neb., 281.) Whether the statements made by Erskine about the lameness and condition of the horse were intended by him to be warranties of the horse's soundness and qualities, or whether by such statements he intended merely to express an opinion, were questions for the jury. (*Halliday v. Briggs*, 15 Neb., 219; *Wolcott v. Mount*, 36 N. J. Law, 262.) If Erskine knew that the representations made by him in regard to the soundness and qualities of the horse were regarded by the Swansons as warranties on the part of Erskine, and believed in, relied, and acted upon by the Swansons, then such representations amounted to warranties on the part of Erskine. (*Hahn v. Doolittle*, 18 Wis., 206.)

2. That the evidence does not show a breach of warranty. There is a sharp conflict in the evidence, but it supports the finding of the jury that the horse at the time of his sale was permanently lame; that he was diseased with "ring

bone" or "thrush of the foot;" that his lameness destroyed his usefulness as a stallion and that he was not a sure foal getter.

3. The court erred in giving to the jury the following instructions:

a. "You are instructed that if you should find from the evidence that the plaintiff, at the time of the making of the sale of the stallion to the defendants, or either of them, stated that said horse was sound, and that the lameness from which the horse was suffering, at the time of the sale, was not of a permanent character, and that the horse would recover from said lameness within a short period of time, and if plaintiff intended that defendants should rely upon such statements as true, and if made to induce defendants to buy, and if you should further find from the evidence that defendants relied upon said statements of plaintiff and were induced thereby to purchase said stallion, and if you should further find from the evidence that the lameness from which the said stallion was suffering at the time of said sale was of a permanent character and impaired the usefulness and value of said horse, then your verdict should be for defendants, provided you further find that by reason of the lameness the value of said horse was depreciated in an amount equal to or exceeding the face of the note in suit."

b. "The jury are further instructed that it is not necessary that in a contract of warranty that the word 'warranty' should be used by the seller in making of the said contract of warranty; but that any language which implies that the animal referred to is sound and adapted to the purpose for which it is sold, if such words were used by the seller, with the intent to lead the buyer to believe that a certain condition existed with reference to the chattel sold, and if the buyer relied upon such statements and was induced thereby to purchase the said property, this will constitute a warranty that the property is as represented, and

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in this case, if you should find from the evidence that the plaintiff at the time of making the sale of the horse referred to in the evidence stated to the purchasers, or either of them, that the horse was all right, and that he would recover in thirty to sixty days from the lameness from which he was suffering and that said lameness was caused from being stepped upon, and if such statements were made with the intent to induce defendants to buy and they did thereby induce them to buy, and if you should further find from the evidence that the lameness referred to was of a permanent character and existed from causes which did not arise from being stepped upon, but from disease or ailment with which the horse was then suffering, and which rendered the horse unfit for the purpose for which it was purchased, and rendered the stallion less valuable to the extent equal to or exceeding the face of the note in suit, then your verdict should be for the defendants."

We think these instructions a correct statement of the law as applied to the evidence in this case, and that the court did not err in giving them. The judgment of the district court is

AFFIRMED.

JAMES F. CAMP V. WILLIAM A. POLLOCK.

FILED SEPTEMBER 17, 1895. No. 6421.

1. **Chattel Mortgages: TITLE TO CHATTELS.** In this state the title to chattels mortgaged remains in the mortgagor. The mortgage creates merely a lien. *Musser v. King*, 40 Neb., 892, followed.
2. **Replevin: CLAIM UNDER CHATTEL MORTGAGE: PLEADING.** A plaintiff in replevin, claiming under a chattel mortgage, must in his petition allege the facts creating his interest and facts entitling him to possession.

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3. **Chattel Mortgages: POSSESSION OF CHATTELS.** There is no presumption that a mortgagee of chattels before condition broken has any right to the possession as against the mortgagor.
4. ———: ———: **REPLEVIN.** A mortgagee of chattels cannot maintain a possessory action against a stranger unless as between mortgagor and mortgagee the latter has the right of possession.
5. **Pleading: AMENDMENT.** Leave to amend a pleading may be properly refused where the motion does not disclose the nature of the proposed amendment.
6. **Liquidated Damages: DIRECTING VERDICT.** Where damages are liquidated and there is no conflict of evidence as to their amount, the court may direct the jury as to the precise amount, and not leave it to the assessment of the jury.

ERROR from the district court of Cedar county. Tried below before NORRIS, J.

The facts are stated in the opinion.

Wilbur F. Bryant and *J. C. Robinson*, for plaintiff in error:

The title to mortgaged chattels is vested in the mortgagee. He is therefore entitled to recover as a general owner. The petition states a cause of action. (*Adams v. Nebraska City Nat. Bank*, 4 Neb., 370; *Marseilles Mfg. Co. v. Morgan*, 12 Neb., 69; *Alexander v. Graves*, 25 Neb., 453; *Robinson v. Fitch*, 26 O. St., 659; Jones, *Chattel Mortgages*, secs. 426, 699; 1 Cobbey, *Chattel Mortgages*, secs. 448, 499; *Fletcher v. Neudeck*, 30 Minn., 125; *Robinson v. Fitch*, 26 O. St., 663; *Lindemann v. Ingham*, 36 O. St., 1; *Stevenson v. Lord*, 15 Col., 131; *Person v. Wright*, 35 Ark., 169.)

Mell C. Jay and *Barnes & Tyler*, contra.

IRVINE, C.

This was an action in replevin for certain live stock, the plaintiff claiming under two chattel mortgages, and the de-

defendant, a judgment creditor of the mortgagor, who was substituted for the sheriff, the original defendant, claiming under a levy of execution upon his judgment. At the close of the evidence the court directed a verdict for the defendant. Judgment was entered on this verdict, and the plaintiff seeks a reversal.

The assignments of error chiefly argued relate to the action of the court in excluding from evidence one of the mortgages under which plaintiff claims. Many objections were urged to the mortgage, among them being that the petition stated no cause of action. The court seems to have based its ruling on other grounds, but if the objection were well taken on this ground, a consideration thereof practically disposes of the case. The petition alleged that the plaintiff "has a special ownership and property in, and is now, and was at the commencement of this suit, entitled to immediate possession of the following goods and chattels, to-wit." Then, after describing the property, the petition proceeds: "The special ownership and property of plaintiff in said property consists in, and arises by virtue of, two certain chattel mortgages thereon, as follows: One executed and delivered by one A. Burrall to plaintiff on or about April 24, 1888, covering the four bulls above described with other property; and one executed and delivered by the said A. Burrall and one R. E. Burrall to the plaintiff on or about October 15, 1889, covering all the property above described except the four bulls, both of which said mortgages are still in full force and unsatisfied, and of the existence of said mortgages and plaintiff's lien and rights thereunder the said defendant had both actual and constructive notice prior to the issuance and levy of his execution on said property." The remaining allegations are not material to the question presented. It is claimed that this petition is defective, in that it avers no facts entitling the plaintiff to the possession of the property. It will be observed that it nowhere appears in the

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petition that the debt to secure which the mortgages were given was due, or that by breach of condition or stipulation in the mortgage the plaintiff had a right to possession. In many states it is the law that a mortgage on chattels passes title to the mortgagee. Where this is so a general allegation of ownership is sustained by proof of a mortgage, and proof of title raises a presumption of the right of possession. In a few early cases in this court there were *dicta* to the effect that the foregoing was the law of this state; but in several recent cases the point was distinctly presented, the *dicta* referred to disapproved, and the law declared to be that the legal title remains in the mortgagor, and until foreclosure the mortgagee has merely a lien on the property. (*Musser v. King*, 40 Neb., 892; *Randall v. Persons*, 42 Neb., 607; *Sharp v. Johnson*, 44 Neb., 165.) It follows that a general allegation of ownership will not be supported by proof of a chattel mortgage, but that the special claim must, in such case, be pleaded. Indeed, this was the precise point presented in the cases cited.

The plaintiff in this case did plead specially his mortgages, but he has not pleaded sufficient to establish his right of possession, unless either the general allegation that he is entitled to the immediate possession is sufficient for that purpose, or unless a right to possession is implied in the mortgagee as against third persons, although the mortgage confers merely a lien and does not pass title. Section 182 of the Code of Civil Procedure requires the affidavit in replevin to aver "that the plaintiff is the owner of the property, or has a special ownership or interest therein, stating the facts in relation thereto, and that he is entitled to the immediate possession of the same." It is possible that if the facts in relation to the plaintiff's special ownership or interest be sufficiently stated, the general averment as to the right of possession would under this statute be sufficient in the affidavit. This, however, is a question not here presented or decided. We are here dealing with

the petition, and not with the affidavit. In *Curtis v. Cutler*, 7 Neb., 315, a somewhat similar case, it was said: "The general averments in the amended petition of the defendant in error, that 'he has a special property in the goods and chattels (describing them), and that he is entitled to the immediate possession thereof, and that they are wrongfully and unjustly detained from him,' are mere propositions of law," and the petition containing such averments was held insufficient. We hold, therefore, that where the plaintiff in replevin relies upon a special ownership, he must specially plead not only the facts in regard to such ownership, but also facts entitling him to possession. If, however, the mortgagee of chattels, before condition broken and in the absence of stipulation, has a right to possession as against third persons, then the pleading of the mortgage would be sufficient, as it would imply the right of possession. An examination of the authorities convinces us, however, that the law is not so. On the contrary, the authorities are to the effect that where, by the terms of a mortgage, the mortgagor is entitled to possession, the mortgagee cannot maintain a possessory action against an officer who has levied upon the goods as the property of the mortgagor. (*Shinners v. Brill*, 38 Wis., 648; *Hamilton v. Mitchell*, 6 Blackf. [Ind.], 131. See, also, *Fenn v. Bittleston*, 7 Exch. [Eng.], 153; *Fairbanks v. Bloomfield*, 5 Duer [N. Y.], 434.) Opposed to some of these cases, in one feature, are *Levi v. Legg*, 23 S. Car., 282, and *McLeod v. Bernhold*, 32 Ark., 671. The two cases last cited hold that where a mortgage contains a stipulation that the mortgagor shall retain possession until condition broken, the mortgagor may, notwithstanding, maintain replevin against a third person who has taken the goods from the mortgagor; but both these cases are based upon the ground that title passed to the mortgagee, and that the stipulation for possession was personal to the mortgagor, and did not operate in favor of a stranger to the mortgage. In this state, as we have seen,

the legal title does not pass. The right of possession, before condition broken at least, is presumably in the mortgagor, and it follows that under such circumstances the mortgagee cannot maintain an action even against a stranger. The petition was, therefore, defective in not averring a state of facts entitling the plaintiff to possession and the judgment for the defendant was right.

During the trial, and immediately before resting his case, a request was made as follows: "The plaintiff asks leave to amend his petition herein generally, subject to any penalty of costs or otherwise that may be imposed by the court." This request was refused. The court did not err in this ruling, for the reason that the request did not disclose the nature of the amendment which was desired.

It is contended that the court erred in directing the amount of the verdict, and that the amount should have been left for the jury to assess. The plaintiff sought to show a partial payment by the mortgagor of the judgment on which the execution was issued. The mortgagor testified that he had delivered certain grain to the defendant, amounting in value to about \$200. He testified, however, that there was no agreement or understanding that this was to be applied on the judgment, but that he understood that the judgment was rendered for rent of a farm for a certain period, and that he delivered the grain in payment of rent for a portion of that period. The transcript of the judgment in evidence shows that it was based on a certain contract, and on a promissory note, and this evidence from the record was not impeachable. There was, therefore, no sufficient evidence to go to the jury to prove a part payment. The evidence as to the measure of damages was in other respects uncontradicted, and the instruction and verdict conformed thereto. The court properly directed a verdict for the amount proved.

JUDGMENT AFFIRMED.

RICHARDSON & BOYNTON COMPANY V. SCHOOL DISTRICT NUMBER ELEVEN OF NUCKOLLS COUNTY.

FILED SEPTEMBER 17, 1895. No. 5795.

1. **Principal and Agent:** PROOF OF AGENCY. Agency cannot be proved by the acts or declarations of the alleged agent not brought home to the principal.
2. **Master and Servant:** SCOPE OF EMPLOYMENT. A master is not bound by the acts or declarations of his servant beyond the scope, or apparent scope, of the servant's employment.

ERROR from the district court of Nuckolls county. Tried below before MORRIS, J.

Gregory, Day & Day and *S. A. Searle*, for plaintiff in error.

W. F. Buck, contra.

IRVINE, C.

The Richardson & Boynton Company sued the school district to recover the unpaid purchase money of three heating furnaces which it alleged it had sold to the school district under a certain written contract. The school district denied that it had entered into the contract sued upon, and alleged a different contract containing an absolute warranty that the furnaces would work satisfactorily, and that if they failed to so work, the vendor would substitute furnaces of a different size, or would remove the furnaces and refund the money paid. The school district then counter-claimed for the amount of money paid on the furnaces, and for other damages. It recovered a verdict for the amount paid with interest. The plaintiff prosecutes error.

The furnaces were bought in 1886. The evidence tended to show that they were used during the winter of 1886 and

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1887, and that in severe weather they proved insufficient to heat the building. Finally, plaintiff replaced two of the furnaces by others of a larger size. After a short trial the school district abandoned these and notified the plaintiff of that fact, and that the furnaces were at its disposal. There was much testimony as to the manner in which the furnaces had operated, and as to transactions between the parties in regard thereto. Mr. Buck, who was principal of the schools when the furnaces were first used, was interrogated as follows:

Q. During the winter did any agent of the plaintiff visit the school building for the purpose of inspecting or improving the operation of the furnaces?

A. They did.

Q. Were you present when they were there?

A. I was.

Q. State who it was and what was said and done.

A. His name was Mr. Springer, if I recollect correctly, and in company with me,—

Objected to by plaintiff, as incompetent, and does not disclose the fact that he is the agent of the plaintiff.

A. He represented himself as being an agent.

Objection by plaintiff to any statement of said party, as there is no proof of agency. Objection overruled. Plaintiff excepts.

Q. State who it was and what was said and done.

Objection by plaintiff to any statement of said party, as there is no proof of agency. Objection overruled. Plaintiff excepts.

A. He said the name was Springer. That he came there for the—he said the furnaces were not successfully operating in the heating of the building, as he expected they would be, and he asked me to observe their operation for a few weeks and write him at Chicago, giving them my observations as to the operation of the furnaces. He went to the various furnaces and was there for some time with

the janitor, and assisted the janitor in operating the furnaces. That is the substance of what was said and done by Mr. Springer.

Q. Did he make any changes or alterations in the construction of the heating apparatus?

A. I think he did. I would not state positively that he did, but I think he did.

Q. What was the result as to heating the building after the visit?

A. There was no change in the result.

The plaintiff assigns as error the overruling of the objection to the question calling for what Mr. Springer said and did. There is no testimony in the record as to Mr. Springer, other than we have quoted, except the following in the cross-examination of the manager of the plaintiff company :

Q. State who Mr. Springer was, if you know. Was he a member of your firm?

A. No.

Q. Was he an employe?

A. Yes.

Q. Was he sent to Superior for the purpose of observing the operation of those furnaces?

A. No.

Q. The plaintiff sent him to Superior?

A. Yes.

It will be observed that the only foundation for the evidence objected to was proof that Mr. Springer was in the employ of the plaintiff, that the plaintiff sent him to Superior, but not for the purpose of observing the operation of the furnaces, and that Springer represented himself to be plaintiff's agent. The manager's testimony was certainly insufficient to establish such a relation between Springer and the plaintiff as to make his acts and declarations competent. No general agency was shown. It was not shown that he had any authority at all in the premises,

and it was not shown that his business in Superior had any connection with the subject-matter of this controversy. It does not appear that the plaintiff ever acted upon, or ratified Springer's statements or acts while in Superior, or that it was ever informed thereof. The testimony of the witness that Springer represented himself to be plaintiff's agent was incompetent to establish agency. (*Stoll v. Sheldon*, 13 Neb., 207; *Nostrum v. Halliday*, 39 Neb., 828; *Burke v. Frye*, 44 Neb., 223.) There is no doubt that the relation of principal and agent may be inferred from the acts of the parties, as contended by defendant, and as held in *Columbus Co. v. Hurford*, 1 Neb., 146. But such acts must be in some way brought home to the principal. The acts of one claiming to be agent not so brought home are incompetent.

The warranty in the contract alleged by plaintiff was conditional, while that alleged by defendant was absolute. The court in stating the issues seems to have overlooked this feature, which was very important under the evidence to the rights of the parties, and submitted only the question as to whether the warranty alleged by the defendant had been broken. The admission in evidence of Mr. Springer's statement that the furnaces were not successfully operating was, therefore, particularly prejudicial.

Several other errors are argued, but for want of proper exceptions or assignments of error they cannot be considered. For the error in the admission of evidence the judgment is reversed.

REVERSED AND REMANDED.

RAGAN, C., not sitting.

ADAM BRANDHOEFER, APPELLEE, V. E. BAIN,
APPELLANT.

FILED SEPTEMBER 17, 1895. No. 6210.

1. **Judgment Under Invalid Statute: VALIDITY: CONSTITUTIONAL LAW: JURISDICTION.** Where a court proceeds in an action according to the provisions of a statute which is unconstitutional, its judgment is not void but at most erroneous, provided its jurisdiction of the action does not depend upon the statute, but exists independently thereof.
2. **Exemption: HOMESTEAD.** Lands acquired under the federal homestead law are forever exempt from liability for the debts of the patentee created before the issuing of the patent, and this although the patentee convey the lands and afterwards re-acquire the title.

APPEAL from the district court of York county. Heard below before BATES, J.

George B. France, for appellant.

Gilbert Bros., *contra*.

IRVINE, C.

Adam Brandhoefer entered the west half of the south-east quarter of section 20, in township 11 north, of range 1 west, in York county, under the federal homestead law. A patent was issued to him in 1878. In 1885 Brandhoefer and wife conveyed the land to Leonidas A. Brandhoefer, and in 1886 Leonidas Brandhoefer conveyed it to Eliza Brandhoefer, the wife of Adam. In 1891 Eliza Brandhoefer died, and on February 29, 1892, the county court of York county, on application of Adam Brandhoefer, set aside the land in question as the homestead of the husband, the county court apparently acting under the provisions of chapter 57 of the Session Laws of 1889, which has since

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been declared unconstitutional. (*Trumble v. Trumble*, 37 Neb., 340.) In 1876, prior to the issuing of the patent, Adam Brandhoefer had become indebted to E. Bain, and in 1879 Bain recovered judgment against him. On July 14, 1892, an order was entered by the county court reviving this judgment. Bain then brought this action, alleging facts which he claimed rendered the land exempt from liability for the satisfaction of the judgment, and praying that it be decreed to be free from the apparent lien thereof. A decree was rendered in favor of the plaintiff, from which Bain appeals. Certain other matters were involved in the case, but the foregoing is all which relates to the subject-matter of the appeal.

Among the questions discussed are several relating to the force and effect of the order of the probate court setting apart to the plaintiff the land in question as his homestead, it being contended on the one hand that the act of 1889 being unconstitutional, these proceedings were void, and, on the other hand, that the declaration of the unconstitutionality of that act did not affect the validity of any proceedings had thereunder, or if it did, that chapter 32 of the Session Laws of 1895, which was intended as a curative act, validated such proceedings. None of these questions do we consider properly involved in a determination of the case. Prior to the passage of the act of 1889 it had been determined that the county court had jurisdiction to assign dower, and, therefore, curtesy, from the lands of a decedent, and also to set aside the homestead of the surviving husband or wife. (*Guthman v. Guthman*, 18 Neb., 98.) Therefore the jurisdiction of a county court to assign an estate by curtesy or a homestead did not depend upon the act of 1889, and irrespective of that act, the county court had jurisdiction of the proceedings which led to the setting aside to Brandhoefer of the land in question as his homestead. This being so, the action of the court in setting aside the homestead in pursuance of the act of 1889 affected only the

regularity of the proceedings, and not the jurisdiction of the court. While its action may have been erroneous, it was not void, and is not open to collateral attack. Therefore, when the plaintiff showed an estate assigned to him by decree of a court having jurisdiction of the subject-matter, this was sufficient proof of title to, *prima facie* at least, establish in him an actionable interest. The force of the decree of the county court does not, therefore, depend in any manner upon the act of 1889. Independent of that act questions are presented as to the effect of the decree as against one not a party to the proceedings, as determining the right of exemption. These questions we shall not determine, because the judgment must in any event be affirmed on another ground.

This land was entered by the plaintiff as a homestead under the federal law, and the debt upon which the judgment was rendered was one created before the patent was issued. Section 2296, Revised Statutes, U. S., provides: "No lands acquired under the provisions of this chapter shall in any event become liable to the satisfaction of any debt contracted prior to the issuing of the patent therefor." The validity of this act of congress has been determined beyond question, and we refer to one case on the subject merely for the purpose of calling attention to the reason of the act. In *Seymour v. Sanders*, 3 Dill. [U. S.], 437, it is said that congress has plenary power over the disposition of public lands to dispose of them at such time, in such manner, and for such purposes as in its judgment it may deem best, and that the object of section 2296 is to benefit the poor man who is unable to pay for the land at once, and receive his title without condition, congress conceiving that the creditor in such cases has no equity to subject to the payment of his debt lands which had been given to the debtor by the bounty of the government. The state courts have uniformly given effect to the provision by holding that judgments rendered for debts contracted prior to the

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patent are not dormant liens, to become valid when the entryman shall convey the land, but, on the contrary, that the provision referred to is a condition attached to the grant of the land which inures not only in favor of the patentee, but in favor of his grantees. (*Smith v. Steele*, 13 Neb., 1; *Baldwin v. Boyd*, 18 Neb., 444; *Jean v. Dee*, 5 Wash., 580; *Sorrels v. Self*, 43 Ark., 451; *Miller v. Little*, 47 Cal., 348; *Russell v. Lowth*, 21 Minn., 167; *Gile v. Hallock*, 33 Wis., 523.) There can be no doubt, therefore, that the land was not subject to the payment of this debt before Brandhoefer conveyed it; nor did it become liable for the debt in the hands of his grantees; but it is urged that, having again reached him, it is now liable. In other words, that while it was not liable as long as he retained it, or in the hands of any one deriving title through him, still, whenever he should acquire a new title to the land, it would then become liable. We cannot find that the precise question has ever been determined. In the absence of direct authority, the apparent analogy of the law of commercial paper at once suggests itself. It is a familiar rule that if a negotiable instrument once reaches the hands of a *bona fide* holder for value, it is discharged from equities, although he should transfer it to a third person with notice of such equities; but still, if the transferee should happen to be the original payee of the instrument, it would be subject to the equities in his hands. This rule and the reasons therefor are strongly stated by Judge Cooley in *Kost v. Bender*, 25 Mich., 515. By examining that case it will be seen that the reasons for the rule are that, while the protection of the innocent holder requires that those taking from him should also be protected, it is not very important that there should be one person in the world incapable of succeeding to his equities. The rule protecting innocent purchasers is for the benefit of the purchaser, and not for the benefit of the culpable payee. Against him the payor, were he compelled to pay the paper, would have his remedy

by action, and to avoid circuity of action if the paper comes back to his hands, the payor should be permitted to set up the defense. The reasons, therefore, for changing the rule in regard to commercial paper, when it returns to the original payee, are in no sense applicable to this case. The policy of the law merchant is to afford full currency to commercial paper. The policy of the homestead law is not to facilitate the free conveyance of the property. The policy of the law merchant is not to protect a payee without equity, but to protect innocent purchasers, while the first object of the homestead act is to protect the patentee. We are satisfied that no analogy can be drawn from the law merchant.

Recurring to the statute its language is of the broadest character: Lands acquired under the homestead act shall not "in any event become liable to the satisfaction of any debt contracted prior to the issuing of the patent therefor." If we should hold that when the patentee has conveyed the land to another, and then re-acquires it, it then becomes subject to liability for debts created prior to issuing of the patent, we should hold that in one event the exemption should not apply, thus, as we believe, engrafting an exception upon a statute couched in universal terms. Furthermore, as will be seen by an examination of the cases already cited, the courts have not regarded this act merely as one of exemption, simply staying the hands of the officers so long as the land is retained as a homestead, but, on the other hand, they have always treated it, not as an exemption, strictly speaking, but as a reservation or condition in the grant itself, whereby, acting under its sovereign authority in the disposal of its public land, the federal government has refrained from conveying the land in such a manner as to subject it to the payment of this particular class of debts. No lien for such a debt ever attached to the land during the patentees' original tenure, or while it remained in his grantees, and we can perceive

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no sound reason why when he became reinvested with the title a lien should then for the first time attach. It is said that when the entryman has been protected in the possession of the land so long as he retains it as his homestead, and when he is permitted to dispose of it for full value without subjecting it to the debt in the hands of his grantee, he has received the full benefit of the exemption, and he should not be entitled to claim the exemption should he become reinvested with the title. This argument has force, but we do not think that it should prevail against the strong language of the exempting statute, and the manifest object to make the land not merely temporarily exempt from execution, but to grant it absolutely and forever free from liability. Our conclusion is that a particular tract of land acquired under the federal homestead law is forever exempt from liability for the debts of the patentee, created before patent issued, and this, without regard to whether he remains the owner or regains the ownership. The judgment of the district court was therefore right.

JUDGMENT AFFIRMED.

HIRAM G. McMILLIN v. DE FOREST RICHARDS.

FILED SEPTEMBER 18, 1895. No. 7132.

1. **Office and Officer: ACTION FOR EMOLUMENTS: PROOF.** In an action against a *de facto* officer to recover the fees and emoluments of the office received by him during his incumbency thereof, the plaintiff, in order to recover, must establish that he is the *de jure* officer. *Richards v. McMillin*, 36 Neb., 352, followed.
2. ———: ———: **PLEADING.** Plaintiff must allege in his petition such facts as show that the strict legal title to the office is vested in him.

3. ———. An officer *de jure* is one who is clothed with the full legal right and title to the office; in other words, one who has been legally elected or appointed to an office, and who has legally qualified himself to exercise the duties thereof according to the mode prescribed by law.
4. ———: APPROVAL OF OFFICIAL BONDS. Under the statute of this state which provides that the official bonds of all county officers, except county commissioners and supervisors, shall be approved by the county board, the approval to be indorsed on the bond, and that no bond shall be filed and recorded until so approved, where the bond of a county treasurer is not accepted and approved by the county board, but is rejected, such person is not a *de jure* officer.
5. **Mandamus:** APPROVAL OF OFFICIAL BONDS. Where an official bond, sufficient in form and substance, on being tendered for approval by one having a *prima facie* title to the office, is rejected, the appropriate remedy for the party is *mandamus* to compel the proper officer or board to accept and approve his bond. (*State v. Lynn*, 31 Neb., 770; *State v. Plambeck*, 36 Neb., 401.)

ERROR from the district court of Dawes county. Tried below before KINKAID, J.

C. H. Bane and D. B. Jenckes, for plaintiff in error.

Albert W. Crites, *contra*.

NORVAL, C. J.

This was an action by plaintiff in error against defendant in error to recover the fees and emoluments of the office of county treasurer of Dawes county during defendant's incumbency thereof as treasurer *de facto*. From a judgment in favor of the plaintiff the defendant prosecuted a petition in error to this court, where a judgment of reversal was entered and the cause remanded to the district court for further proceedings therein on March 1, 1893. (See *Richards v. McMillin*, 36 Neb., 352.) After said reversal, an amended petition was filed in the district court, to which the defendant interposed a general demurrer, which

was sustained by the court, and the plaintiff electing to stand on his pleading, the action was dismissed. Plaintiff prosecutes error.

The plaintiff for cause of action alleges, in substance :

1. That on the 27th day of June, 1885, at the first election held in Dawes county, he was elected county treasurer of said county and on the 11th day of the following month he filed his bond as required by law, which was duly approved by the county board, and that he took the oath of office and entered upon the discharge of the duties of county treasurer.

2. That at the general election held in said county on November 3, 1885, the defendant De Forest Richards, being a candidate for the office of county treasurer, received a majority of the votes cast for said office, and received his certificate of election from the county clerk.

3. That on November 20, 1885, plaintiff instituted proceedings in the county court to contest the election of defendant, on the ground of ineligibility at the time of said election, and that said election was null and void, which judgment, on being appealed to the district court, was affirmed at the February, 1888, term thereof, and still remains in full force and effect.

4. That under the judgment of the county court plaintiff continued to hold, occupy, and discharge the duties of county treasurer of said county, "and that on, to-wit, the 17th day of January, 1886, said date being within ten days from the time when said Richards would have been obliged to qualify as such county treasurer under the statutes, if eligible to said office, plaintiff made out and tendered to said board of county commissioners of Dawes county a new bond as such county treasurer, with good and sufficient security thereto, for their approval, and said plaintiff took and subscribed to the oath of office thereon as provided by law, and in all respects complied fully with all the requirements as provided by law, and was eligible

to said office and is eligible to fulfill the duties of said office; and that said board of county commissioners, believing at the time said plaintiff tendered his bond and oath of office as hereinbefore recited that they had appointed the defendant as treasurer of said county, refused to approve and accept the said bond and oath of office of the plaintiff."

5. The plaintiff legally held over his said office and was entitled to, and it was his duty to exercise the functions of said office and to receive the fees and emoluments thereof until his successor should be elected and qualified, and that the term which the plaintiff held over did not expire until the first Thursday after the first Tuesday in January, 1888.

6. That on January 9, 1886, the board of county commissioners declared the office of county treasurer vacant, and appointed the defendant to fill the same.

7. That defendant obtained possession of the tax lists of the county, exercised the powers and duties of the office, and received the fees and emoluments thereof and kept the plaintiff therefrom. That plaintiff has repeatedly demanded from the defendant said office and the books, papers, and moneys belonging thereto, with which demand the defendant refused to comply.

8. The fees and emoluments of said office received and kept by the defendant from the time he entered upon the duties thereof until the end of said term amounted to \$1,757.20.

9. That plaintiff was ready, willing, and at all times desirous to perform the duties pertaining to said office during the period he was deprived thereof by defendant.

10. The plaintiff made demand of the defendant for said sum of \$1,757.20, but payment was refused.

Upon the former hearing it was held, substantially, that in an action against a *de facto* officer to recover the emoluments of a public office received by the defendant during his incumbency thereof the plaintiff will not be entitled to

recover, unless it be established that he is the *de jure* officer; and further, that the evidence failed to disclose that plaintiff herein is an officer *de jure*, in that there was an entire lack of evidence that he qualified as a hold-over officer within the period fixed by statute. It being essential that the plaintiff in an action like this prove he is the *de jure* officer, it follows that he must aver such facts in his petition as show him to be one. Has McMillin done so in this case? The only substantial difference between the original petition, the one on which the cause was first tried, and the amended pleading now before us, is the allegation quoted above, from which it appears that plaintiff, on January 17, 1886, executed and tendered to the county board a bond as a hold-over officer, and took and subscribed the oath of office, and that said county board refused to accept and approve said bond. We do not believe the giving of the bond and the taking of the oath prescribed by law alone were sufficient to invest in the plaintiff the legal title to the office of the county treasurer, or to constitute him a *de jure* officer. An officer *de jure* is one who is clothed with the full legal right and title to the office; in other words, one who has been legally elected or appointed to an office, and who has qualified himself to exercise the duties thereof according to the mode prescribed by law. (19 Am & Eng. Ency. of Law, 394; *Plymouth v. Painter*, 17 Conn., 585; *City of Philadelphia v. Given*, 60 Pa. St., 136; *Kimball v. Alcorn*, 45 Miss., 151.) While it appears from the averments made in the amended petition which the defendant by his demurrer admits to be true, the plaintiff filed his bond as a hold-over officer with the county board, yet the same was never approved by said board, but was rejected by them. Section 7 of chapter 10, Compiled Statutes, requires the official bonds of all county officers, except county commissioners and supervisors, to be approved by the county board, and section 11 of said chapter provides that such approval shall be indorsed upon the bond by the approving officer,

and that no bond shall be filed and recorded until so approved. As we construe the statute, plaintiff was not a *de jure* officer, nor qualified to perform the duties of the office until the bond he presented was duly approved. Simply taking the oath and filing the bond prescribed by law, it is obvious, were not sufficient to entitle the plaintiff to legitimately perform the duties of county treasurer. Manifestly, it was the intention of the legislature that a county officer elect should not enter upon the duties of his office until his bond and the sureties thereon have been approved by the proper officer or board. Without such approval, plaintiff is not a *de jure* officer, and, therefore, cannot maintain the action.

State v. Lewis, 10 O. St., 128, was a proceeding by *quo warranto* to determine the right of the relator and respondent to the office of sheriff of Marion county. The relator was elected to succeed the respondent and tendered to the proper officers a good and sufficient bond, which they declined to accept and approve because it was claimed the same was not presented in time. The court, in the opinion, observe: "He [relator] was not authorized to enter upon the duties of his said office and oust the defendant, until his official bond had been accepted and approved by the county commissioners. If the bond was, in fact, rejected by them, though for an insufficient or improper reason, the sureties in that bond could hardly be held responsible for his subsequent official delinquencies. If the facts stated in the information are true, he should have applied for *mandamus* to compel the county commissioners to accept and approve his bond instead of proceeding by *quo warranto* against the former incumbent, who rightfully retains the office until his successor has been, in all respects, qualified to assume its duties. For these reasons the present application must be refused."

In *State v. Lynn*, 31 Neb., 770, which was *quo warranto* to oust the respondent from the office of justice of the peace

and to install the relator therein, the court uses this language: "The relator's bonds were both filed within the ten days required by statute. The cause for failing to approve the same is not shown. It must be presumed that a sufficient cause existed to justify the action of the county board, although the action of that board has somewhat the appearance of being arbitrary; but we cannot determine that matter in this action. The remedy of the relator, upon filing a good and sufficient bond with the county clerk, and upon taking the oath required by law, within the time limited, was to proceed by *mandamus* against the board to compel the approval of the bond. The board can then be heard in its own defense, and unless adequate cause was shown for its rejection of the bond, it will be compelled to approve the same. The bond has no force or validity until approved, because the party required by statute to approve the same refuses to accept it as a sufficient bond."

If the approval of a bond by the proper authority is indispensable to the complete qualification of an officer so as to entitle him to maintain an action to recover the office by *quo warranto*, it would seem clear then, by a parity of reasoning, that such actual approval is also necessary to authorize such officer to recover the compensation attaching to the office, since, as ruled in the former opinion, the right to the emoluments of an office depends upon the strict legal title to the office. The plaintiff, upon the failure of the county board to accept and approve his bond, could have applied for a writ of *mandamus* to compel it to do so. But it is said in the brief that the board having already approved the bond of Richards, an application for a writ of *mandamus* would have been unavailing, inasmuch as the writ may not issue to control the discretion of an officer, and, further, such a proceeding would have involved the question of the title of the office, and this cannot be tried in such an action. There is no allegation in the petition that Richards ever gave a bond, much less that the board

ever approved it. From the record before us, if plaintiff was legally entitled to the office, the approval of his bond would not have been discretionary with the board, inasmuch as it is alleged, and by the demurrer admitted to be true, that the bond was in due form and executed by sufficiently competent sureties. Although *mandamus* is not the appropriate action to try the title of an office, yet in an application for such a writ to compel the approval of an official bond of the relator sufficient inquiry may be made to ascertain whether he has a *prima facie* right or title to the office. A party having such a title has the right to have his bond, if sufficient, approved. This was expressly decided in *State v. Plambeck*, 36 Neb., 401. The conclusion reached makes the consideration of the other questions argued by counsel wholly unnecessary. The judgment is

AFFIRMED.

KILPATRICK-KOCH DRY GOODS COMPANY V. STRAUSS,
UHLMAN & GUTHMAN.

FILED SEPTEMBER 18, 1895. No. 5951.

1. **Fraudulent Conveyances: CHATTEL MORTGAGES: EXCESSIVE SECURITY.** The fact that a chattel mortgage covers property largely exceeding in value the amount of the debt secured raises no conclusive presumption of fraud as to creditors of the mortgagor. Such fact is at most evidence of fraud, to be given such consideration as it may be entitled to, in connection with the other circumstances surrounding the transaction involved.
2. **Replevin.** The rights of parties to an action of replevin under our practice must as a rule be determined by the facts as they existed at the time the action was commenced.

ERROR from the district court of Merrick county. Tried below before SULLIVAN, J.

Montgomery, Charlton & Hall, for plaintiff in error.

Harwood, Ames & Pettis, contra.

Post, J.

This was an action of replevin in the district court for Merrick county by the plaintiff in error against W. H. Crites, sheriff, who was, when the action was commenced, in possession of the property in controversy by virtue of two orders of attachment issued by the county court of said county in favor of the defendants Strauss, Uhlman & Guthman and against J. J. Gallogly. On trial to the court, a jury being waived, there was a finding and judgment for the defendants in error, who had in the meantime been substituted for the sheriff, and which judgment has been removed into this court for review upon the petition in error of the plaintiffs.

The facts out of which the controversy arose, so far as they are necessary to an understanding of the question presented, are as follows: For several years previous to December 2, 1889, James J. Gallogly was engaged in the business of a general merchant at Chapman, in Merrick county. On the day named, for the express consideration of \$5,079.38, he executed in favor of his wife, Alice E. Gallogly, a chattel mortgage, whereby he conveyed to her his entire stock of merchandise, store fixtures, five horses, one carriage, and three sets of harness. On February 5, 1890, said mortgage was released and satisfied by the mortgagee in consideration of an absolute conveyance to her by her husband of all the mortgaged property. The last mentioned transaction was evidenced by a bill of sale in the usual form, which was filed for record on the day of its execution. Five days later, on February 10, Mrs. Gallogly, at the request of her husband, executed five separate chattel mortgages upon the said stock of merchandise and

store fixtures, to-wit: To the Kilpatrick-Koch Dry Goods Company, for \$1,413.23; to Darrow & Logan, for \$158.88; to Kirkendall, Jones & Co., for \$574.23; to McCord, Brady & Co., for \$1,909.23; and to the defendants Strauss, Uhlman & Guthman, for \$1,128.29. Said mortgages were all given to secure the indebtedness of Gallogly, and each subject to those preceding it in the order above named. With the exception of the last mentioned mortgage, which was voluntarily executed by Gallogly without the knowledge or consent of defendants, they were all made at the solicitation of Mr. Kilpatrick, president of the plaintiff company, who immediately took possession of the property conveyed in the name of the several mortgagees. By agreement of the parties other than the defendants the plaintiff company proceeded to sell and dispose of the mortgaged property at private sale, and which continued without interruption until March 8, when the defendants, who had repudiated the mortgage in their favor, began two actions against Gallogly in the county court of Merrick county for the amount of the latter's indebtedness to them, and in which the orders of attachment above mentioned were issued. The property in controversy having been seized by the sheriff to satisfy the aforesaid orders of attachment, this action was instituted by the plaintiff for the purpose of asserting its right of possession under the several mortgages. The facts as found by the district court are as follows:

"1. That the bill of sale from Gallogly to Mrs. Gallogly was valid.

"2. That on February 10, 1890, for an adequate consideration paid by Gallogly, his wife joined him in conveying the stock of goods in question to the plaintiffs. This transaction was in substance and legal effect a surrender of the title to Gallogly and a transfer of the stock to him.

"3. The petition declares the giving of each mortgage to the several plaintiffs to be a separate and distinct transac-

tion. It should be so considered. The subsequent mortgages are strengthened by the prior ones, but the prior mortgages receive no reciprocal support from the subsequent mortgages.

"4. Each of the plaintiffs took excessive security for his claim.

"5. The mortgages of each of the plaintiffs are fraudulent and void by reason of the taking of such excessive security.

"6. From the sale of the goods described in the mortgages of the plaintiffs their claims have been filed fully paid, leaving a surplus more than sufficient to pay the amount due the defendants Strauss, Uhlman & Guthman.

"7. The goods in controversy have been sold and cannot be returned.

"8. The defendants Strauss, Uhlman & Guthman should have judgment for the amount of their claim, being \$1,302, and the costs due on the orders in dispute.

"9. The court further finds that at the beginning of this suit the right of possession and the right of property of the goods and chattels in controversy herein were in the defendants, and that the said defendants were entitled to the possession of the same. To each and all of said findings the plaintiffs jointly and severally except, and said exceptions are allowed."

A motion for a new trial was interposed, in which the following grounds were alleged:

1. Errors of law occurring at the trial.
2. The findings and judgment are not sustained by the evidence.
3. The findings and judgment are contrary to law.

It is urged that the plaintiff has no standing in this court, for the reason that the assignments of the motion for a new trial are indefinite and that the findings assailed should have been specifically pointed out. It is, however, deemed unnecessary to examine that question, since the

judgment is, in our opinion, unsupported by the findings and therefore contrary to law. By the fourth and fifth findings we understand the district court to hold that the taking of excessive security is *per se* a fraud upon creditors, for which the mortgage will be held void as a matter of law, without regard to the motives of the parties. That conclusion, it must be confessed, is not without support in the opinions of this court. (See *Morse v. Steinrod*, 29 Neb., 108; *Brown v. Work*, 30 Neb., 800; *Thompson v. Richardson Drug Co.*, 33 Neb., 714.) But the cases cited, in so far as they assert the doctrine of the findings, are in evident conflict with our later decisions announced subsequent to the entry of the judgment here involved, which hold that the taking of security greatly in excess of the debt due is a matter of evidence only, to be given such consideration as it may be entitled to in view of all of the surrounding circumstances, in determining whether the transaction involved is fraudulent in full. (See *Kilpatrick-Koch Dry Goods Co. v. McPheely*, 37 Neb., 800; *Sherwin v. Gaghagen*, 39 Neb., 238; *Kilpatrick-Koch Dry Goods Co. v. Bremers*, 44 Neb., 863; *Grand Island Banking Co. v. Costello*, 45 Neb., 119.) It follows that the judgment cannot be sustained on the ground that the mortgages represented by the plaintiff are fraudulent as to creditors.

The only remaining question is the effect to be given the sixth finding, viz., that the money in plaintiff's hands, the proceeds of the mortgaged property after discharging the claims represented by it, is sufficient to satisfy the amount due defendant. It is contended on the authority of *Blue Valley Bank v. Bane*, 20 Neb., 295, that the finding mentioned will support the judgment, which is for the return of the property, or, in case a return cannot be had, for the amount of the defendants' claim, to-wit, \$1,333.34. That contention, it is evident, rests upon an entire misconception of the doctrine of the case cited. From an examination of the concluding paragraph of the opinion it appears that

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the judgment, in so far as it determined the question of the right of possession in favor of the plaintiff below, is affirmed, while the provision thereof in favor of the defendants for the recovery of the surplus in plaintiff's hands derived from the sale of the mortgaged property is reversed. The precise question involved was presented in *Gillespie v. Brown*, 16 Neb., 457, and determined adversely to the claim of defendants herein, and the doctrine of the last mentioned case is expressly approved in *Kay v. Noll*, 20 Neb., 380, and *Fischer v. Burchall*, 27 Neb., 245. In *Gillespie v. Brown* REESE, J., uses this language: "It is also claimed that the proof shows a surplus in the hands of the defendants in error, and if their mortgage be held valid, the plaintiff in error should by virtue of his levy have a lien on such surplus. That question cannot arise in this case. The contention is only for the possession of the property." The reasoning as well as the conclusion of the cases cited are decisive of the present controversy. It follows that the judgment must be reversed and the cause remanded for further proceedings in the district court.

REVERSED AND REMANDED.

ENOS CLARK, APPELLEE, V. CAMBRIDGE & ARAPAHOE
IRRIGATION & IMPROVEMENT COMPANY, APPEL-
LANT, ET AL.

FILED SEPTEMBER 18, 1895. No. 7594.

1. **Navigable Waters.** The courts of this country have not as a rule adopted the common law definition of the term "navigable waters," which here include those waters only which afford a channel for useful commerce, whether the beds thereof are public or private property, and without regard to the influence of the ocean tide.

2. **Evidence: JUDICIAL NOTICE.** The courts of this state take notice without proof that the Republican river is unnavigable.
3. **Riparian Rights.** Except as abrogated or modified by statute, the common law doctrine with respect to the rights of private riparian proprietors prevails in this country.
4. ———: **DAMAGES.** The right of a riparian proprietor, as such, is property, and when vested can be impaired or destroyed only in the interest of the general public, upon full compensation and in accordance with established law.
5. **Constitutional Law: IRRIGATION: RIPARIAN RIGHTS.** The provision of the irrigation law of 1889, and the act of 1893, amendatory thereof, abolishing riparian rights in all streams over twenty feet in width, is a clear invasion of private property and within the prohibitive features of the constitution.
6. **Injunction: LACHES.** A suitor who has by his laches made it impossible to prevent the completion or use of public works without great injury to his adversary, or inconvenience to the public, is not entitled to the preventive remedy of injunction, but will be confined to the relief obtainable by ordinary means in a court of law.

APPEAL from the district court of Furnas county. Heard below before WELTY, J.

There is a statement of the case in the opinion.

F. I. Foss and *W. R. Matson*, for appellant:

As to title to the water rights and character of the stream the following authorities are cited: *Illinois C. R. Co. v. People*, 146 U. S., 387; *Jones v. Soulard*, 24 How. [U. S.], 41; *Smith v. City of Rochester*, 92 N. Y., 463; *Chenango Bridge Co. v. Paige*, 83 N. Y., 178; *Avery v. Fox*, 1 Abb. [U. S.], 246; *The "Montello"*, 20 Wall. [U. S.], 430.

The mill is a public nuisance and subject to abatement. (Wood, Nuisance [2d ed.], 80, 792; Cooley, Torts, 612, 614; *Rhodes v. Whitehead*, 27 Tex., 304; *Mills v. Hall*, 9 Wend. [N. Y.], 315; *Santa Clara County v. Southern P. R. Co.*, 18 Fed. Rep., 423; Gould, Waters, 78; *Lammers*

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v. Nissen, 4 Neb., 245; *Bissell v. Fletcher*, 19 Neb., 725; *East Omaha Land Co. v. Jeffries*, 40 Fed. Rep., 386.)

The title of the United States is perfect. A stream of water running through a tract of land is part and parcel of it. Prescription does not avail against the United States. (*Union Mill and Mining Co. v. Ferris*, 2 Sawyer [U. S. C. C.], 176; *Vansickle v. Haines*, 7 Nev., 249; *Gibson v. Chouteau*, 13 Wall. [U. S.], 93.)

The appropriation of water for the purpose of irrigation affords no ground of complaint by the lower proprietor, though the water be entirely consumed. (*Rhodes v. Whitehead*, 27 Tex., 304; *Evans v. Merriweather*, 3 Scam. [Ill.], 492.)

The appropriation is made with regard to the ordinary stream. (*Proctor v. Jennings*, 6 Nev., 83; *Inhabitants of China v. Southwick*, 12 Me., 238; *Bell v. McClintock*, 9 Watts [Pa.], 119; Angell, *Water Courses* [7th ed.], sec. 491b; *Thurber v. Martin*, 2 Gray [Mass.], 394; *Smith v. Agawam Canal Co.*, 2 Allen [Mass.], 357; *Monongahela Navigation Co. v. Coon*, 6 Pa. St., 383; *Pixley v. Clark*, 35 N. Y., 520.)

The remedy by injunction does not apply in this case, for the invasion of the right in question is not difficult of estimation and can be adequately compensated in damages. (*Quackenbush v. Van Riper*, 2 Greene Ch. [N. J.], 350; *Woodin v. Wentworth*, 57 Mich., 278; *Bull v. Valley Falls Co.*, 8 R. I., 42; *Spangler's Appeal*, 64 Pa. St., 387; Gould, *Waters*, sec. 511; *Nosser v. Seeley*, 10 Neb., 467; *De Necochea v. Curtis*, 80 Cal., 397; *Burrows v. Burrows*, 82 Cal., 564.)

There has been such an acquiescence on part of plaintiff in the appropriation complained of as to estop him from claiming the equitable relief sought. (*State v. Graham*, 21 Neb., 329; *Nosser v. Seeley*, 10 Neb., 460; *Forbes v. McCoy*, 24 Neb., 702; *Gillespie v. Sawyer*, 15 Neb., 536; *Richardson v. Doty*, 25 Neb., 426; *Menard v. Hood*, 68

Ill., 121; *Owen v. Ford*, 49 Mo., 436; *Cole v. Duke*, 79 Ind., 107; *East Saginaw Street R. Co. v. Wildman*, 58 Mich., 286; *Mayor v. Mitchell*, 79 Ga., 807; *Brown v. Merrick County*, 18 Neb., 355; *Fremont Bridge & Ferry Co. v. Dodge County*, 6 Neb., 18; *Western Union Telegraph Co. v. Pacific & Atlantic Telegraph Co.*, 49 Ill., 90; *Hazlehurst v. Savannah & N. A. R. Co.*, 43 Ga., 13; *Roberts v. Davidson*, 83 Ky., 279; *Thomas v. Woodman*, 23 Kan., 217; *Swift v. Jenks*, 19 Fed. Rep., 641; *Mayor of Jersey City v. Gardner*, 33 N. J. Eq., 622; *City of Logansport v. Uhl*, 99 Ind., 531; *Westbrook Mfg. Co. v. Warren*, 77 Me., 437; *East & W. R. Co. v. East Tennessee & V. R. Co.*, 75 Ala., 275; *Outcalt v. Helme Co.*, 42 N. J. Eq., 665; *Roath v. Driscoll*, 20 Conn., 533; *Prentiss v. Larnard*, 11 Vt., 135; *Sheboygan v. Sheboygan & F. R. Co.*, 21 Wis., 667; *Bliss v. Kennedy*, 43 Ill., 67; *Varney v. Pope*, 60 Me., 192; *Peters v. Hansen*, 55 Mich., 276.)

McClure & Anderson, for intervenors.

Thomas H. Matters, for appellee:

As to right of appellee to the water, the following authorities are cited: Consolidated Statutes, sec. 2057; *Pugh v. Wheeler*, 2 Dev. & B. [N. Car.], 55; 6 Lawson, Rights, Remedies & Practice, 2914; *Vansickle v. Haines*, 7 Nev., 249; *Bliss v. Kennedy*, 43 Ill., 76; *Merrifield v. Lombard*, 90 Am. Dec. [Mass.], 172; *Lux v. Haggin*, 10 Pac. Rep. [Cal.], 674; *Davis v. Getchell*, 79 Am. Dec. [Me.], 638; Kinney, Irrigation, 521; Gould, Waters, secs. 304, 305; Angell, Water Courses, sec. 135.

The appellee claims that by virtue of purchase, chain of title from the United States, ten years' uninterrupted possession, appropriation, and more than ten years' user of the water, he has a clear title to the premises and vested rights in the land and use of the water, which cannot be disturbed by legislation. (Constitution, sec. 21, art. 2; *Traver*

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v. Merrick County, 14 Neb., 333; Compiled Statutes, sec. 27, ch. 57; *Monroe v. Ivie*, 2 Utah, 535; *Mud Creek Irrigation Co. v. Vivian*, 74 Tex., 170.)

The Republican river is not in law or in fact a navigable stream. (Kinney, Irrigation, 54; *The "Daniel Ball,"* 10 Wall. [U. S.], 563; *Propeller "Genesee Chief" v. Fitzhugh*, 12 How. [U. S.], 443; *Nutter v. Gallagher*, 24 Pac. Rep. [Ore.], 250.)

The mill is not a public nuisance. (*Traver v. Merrick County*, 14 Neb., 327; *State v. Clay County*, 20 Neb., 452.)

Any user of a stream by an upper proprietor which substantially diminishes its volume or defiles its capacity to such a degree as to essentially impair its purity, and to prevent the use of it for any of the reasonable and proper purposes to which running water is usually applied is improper and will be enjoined. (*Merrifield v. Lombard*, 90 Am. Dec. [Mass.], 172.)

POST, J.

This is an appeal from a decree of the district court for Furnas county perpetually restraining the defendant the Cambridge & Arapahoe Irrigation and Improvement Company from diverting the waters of the Republican river for the purpose of irrigation by means of a ditch or canal of which the defendant company is the owner and proprietor. It is in the petition, in substance, alleged that the plaintiff, in the year 1879, in said county, erected a mill for the purpose of grinding grain, and has since the completion thereof in the year mentioned continuously used and operated said mill for the purpose aforesaid; that his said mill is supplied with water power by means of a dam constructed by him in the Republican river in the year 1879, on land then and now owned by him; that he has since said date until the year 1891 had the continued and uninterrupted use of the water of said river, and which is, when not interfered

with by the defendant, sufficient to supply all of his needs, but that in the year last named the defendant company commenced the construction of a ditch or artificial waterway in said county, which taps the Republican river about fourteen miles above his said mill, and now threatens to divert the water from said stream or so much thereof as to deprive the plaintiff of his water power and render his mill worthless, etc. The defendant for answer, after charging that it is an irrigating company duly and legally organized under the laws of this state, alleges that in the month of August, 1891, it in due and legal form appropriated the waters of the Republican river to the amount of 300,000 cubic inches measured under a four-inch pressure; that it immediately began the construction of an irrigating canal, commencing at the point where said appropriation was made, and that said canal was within a reasonable time fully completed, and by means of which the defendant is now engaged in furnishing water for the purpose of irrigation to divers persons along the line of its said ditch. It is also alleged that the water flowing in the Republican river during ordinary seasons is ample to supply the necessities of the plaintiff notwithstanding the diversion thereof by the defendant company, and notwithstanding the fact that there have been since the year 1885 constructed twenty-seven irrigating canals in this state and the state of Colorado, all of which have acquired by appropriation a valid right to, and are now actually using, the water of the Republican river for the purpose of irrigation. There is a further allegation to the effect that the plaintiff, who was aware of said appropriation and contemplated diversion of water, interposed no objection thereto, but, on the contrary, by his silence encouraged the defendant to undertake and complete the said canal, which was done at great expense, to-wit, at the cost of \$40,000, wherefore he should not now for the first time be heard to assert any rights in the premises superior to those of the defendant, and that his remedy, if

any, is by an action for damage and not by injunction. At this stage of the controversy Swan Freeman and six others were permitted to intervene for the purpose of asserting their rights in the premises adverse to the plaintiff. In the pleading interposed by them, in addition to the allegations contained in the answer of the defendant company, it is charged that said intervenors are the owners of farming lands situated under the aforesaid canal, that the defendant is by law required to supply them with water for the irrigation of the several farms, and that their equities in the premises are superior to those of the plaintiff. The statements of the answer and also of the intervenor's petition are met by a reply which may be treated as a general denial. The foregoing statement omits many allegations of the pleadings, some of which are foreign to the real questions involved and others tender issues of law only.

The able arguments with which we have been favored include many questions of vital importance in view of the prominence given to the subject of irrigation in the recent legislation of this state, but a few of which, for reasons hereafter appearing, call for notice in this opinion.

The first proposition to which we will give attention is that inasmuch as the original surveys meander along the banks of the Republican river and the adjoining lands were conveyed by patents which do not include the bed of that stream, the title thereof remained in the general government, and subsequently passed to and became the property of this state upon its admission into the Union as such,—in short, that the Republican is in legal effect a navigable river, and that plaintiff's dam therein is a public nuisance, and not within the protection of the law. At common law navigable streams are held to be those in which the tide ebbs and flows. (3 Kent, Commentaries, 413, and note; Black's Pomeroy, Waters, sec. 216.) But the doctrine of the common law has not, as a rule, been accepted in this country, and has been entirely repudiated by

the courts of the United States in determining the jurisdiction of congress over lakes and streams, whether situated in two or more states or within the boundaries of a single state. In those courts navigability in law is synonymous with navigability in fact, without regard to the influence of the ocean tide, and includes those waters only which afford a channel for useful commerce (see *United States v. Steamer "Montello,"* 87 U. S., 430; *Miller v. Mayor of New York*, 109 U. S., 385), and although the decisions of the state courts are not altogether harmonious, the rule stated is in accordance with the decided weight of authority. (See 16 Am. & Eng. Ency. of Law, title "Navigable Waters," and the valuable collection of cases therein by Mr. Charles S. Lobingier.) The courts of this state will take notice of this fact, which is also established by abundant proof, that the Republican is not a navigable river within the foregoing definition.

The appellant's next contention is that conceding the Republican to be unnavigable, the water thereof is public property and may be acquired by appropriation without regard to the claims of riparian proprietors. That contention is based upon the provisions of the act of March 27, 1889, and which, for convenience, may be referred to as the "Rayner Irrigation Law," the first section of which, as amended in 1893, reads as follows: "The right to the use of running water flowing in any river or stream, or down any canyon or ravine, may be acquired by appropriation by any person, company or corporation, organized under the laws of the state of Nebraska; *Provided*, That in all streams not more than twenty (20) feet in width the rights of the riparian proprietor shall not be affected by the provisions of this act." (Session Laws, 1893, p. 377, sec. 1, ch. 40.) Authority is by other sections conferred upon persons and corporations in certain cases to condemn the right of way over and upon any lands for irrigating ditches and for the enforced access thereof to the public

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waters of the state; and by a subsequent act, water for the purpose of irrigation is declared to be a natural want. (Session Laws, 1895, p. 268, sec. 65, ch. 69.) It is conceded that the Republican river exceeds twenty feet in width and is therefore not within the exception of the section quoted. It is important in giving effect to these statutes to examine them in the light of the laws in force at the time of their adoption. Although the contrary has been asserted in some of the arid Pacific states (see *Reno Smelting, Milling & Reduction Works v. Stevenson*, 20 Nev., 269; *Stowell v. Johnson*, 26 Pac. Rep. [Utah], 290), the common law doctrine with respect to the rights of private riparian proprietors, except as modified by statute, prevails in this country. (*Eidemiller Ice Co. v. Guthrie*, 42 Neb., 238; Black's Pomeroy, Waters, secs. 127, 130, and authorities cited.) At common law every riparian proprietor, as an incident to his estate, is entitled to the natural flow of the water of running streams through his land, undiminished in quantity and unimpaired in quality, although all have the right to the reasonable use thereof for the ordinary purpose of life (3 Kent, Commentaries, 439; Angell, Water Courses, sec. 95; Gould, Waters, sec. 204; Black's Pomeroy, Waters, sec. 8), and any unlawful diversion thereof is an actionable wrong.

It is a well known fact that our irrigation laws are modeled after the statutes of California, and we may with profit look to the interpretation there given them, in determining to what extent, if at all, they abrogate or modify common law rules. In *Lux v. Haggin*, 69 Cal., 255, a leading and instructive case, the question presented was the effect of section 1422 of the Civil Code of that state, viz., "The rights of riparian proprietors are not affected by the provisions of this title." It was held, after an exhaustive examination of the subject, that the statute, so far as it authorizes the appropriation of water, applies to such water only as flows over the lands of the state and the United

States, and that the section quoted was intended to save the rights of all riparian owners whose titles were acquired before or since the adoption of the Code; and that construction of the statute accords with the views of both Mr. Pomeroy and Mr. Black. (See Black's Pomeroy, Waters, sec. 127.) It may be that our statute, unlike the Code of California, was intended to embrace all waters of the state, since it is an historical fact, of which we take notice, that the public lands along the streams of this state had practically all been disposed of previous to 1889. But it is unnecessary to pursue the subject at this time, for, assuming such to have been the intention of the legislature, it is a clear invasion of private rights and within the prohibition of the constitution. The right of a riparian proprietor, as such, is property, and when vested can be destroyed or impaired only in the interest of the general public, upon full compensation and in accordance with established law. (*Lux v. Haggin*, *supra*; *Yates v. City of Milwaukee*, 10 Wall. [U. S.], 497; *Potomac Steamboat Co. v. Upper Potomac Steamboat Co.*, 109 U. S., 672; *Delaplaine v. Northwestern R. Co.*, 42 Wis., 214; *Bell v. Gough*, 23 N. J. Law, 624; *Trenton Water Power Co. v. Raff*, 36 N. J. Law, 335.) That the state may, in the exercise of the right of eminent domain, appropriate the water of any stream to any purpose which will subserve the public interests is not doubted, and that the reclamation of the inarable lands of the state is a work of public utility within the meaning of the constitution is a proposition not controverted in this proceeding. But even the state in its sovereign capacity is, as we have seen, within the restrictions of the constitution and can take or damage private property only upon the conditions thereby imposed. The proposition that the rights of riparian proprietors were abolished by operation of the statutes is, therefore, without merit. It does not, however, follow that equity will interfere to prevent the use of the water in this instance at the suit of the plaintiff, although actions to

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prevent the invasion of private rights by persons claiming public powers is a favored subject of equitable cognizance. It is clearly established by the proofs that the construction of the irrigating ditch was undertaken and carried out by the defendant company in good faith in accordance with the purpose of its creation, at a cost of many thousands of dollars, and in the belief on the part of its promoters and managing officers that it was entitled to divert the water of the Republican river. It is also practically undisputed that the plaintiff was from the first fully advised of both the undertaking and the purpose of the defendant, and it is certain that he interposed no objection thereto until after the substantial completion of the work. The rule which denies relief in equity to one who has slept upon his rights applies in all its force to cases where the defendant is engaged in a work of public interest. In fact there is no principle more firmly established in the jurisprudence of this country than that a suitor who has by his laches made it impossible to restrain the completion or use of public works without great injury to his adversary or the public will be left to pursue his ordinary legal remedies. (*Erie R. Co. v. Delaware, L. & W. R. Co.*, 21 N. J. Eq., 283; *Traphagan v. Mayor of Jersey City*, 21 N. J. Eq., 206; *Campbell v. Indianapolis & V. R. Co.*, 110 Ind., 490; *Midland R. Co. v. Smith*, 113 Ind., 233; *Organ v. Memphis & L. R. Co.*, 11 S. W. Rep. [Ark.], 96; *Goodin v. Cincinnati & White-water Canal Co.*, 18 O. St., 169; *Curtis v. La Grande Water Co.*, 20 Ore., 34; High, Injunctions, sec. 643; Rorer, Railroads, 741-757; Wood, Railway Law, 794.) And the same principle is recognized by this court in *Nosser v. Seckey*, 10 Neb., 460, *State v. Graham*, 21 Neb., 329, and *Forbes v. McCoy*, 24 Neb., 702.)

We are asked to determine in this action the question of the plaintiff's rights in the premises by reason of his alleged adverse use of the water of the Republican river for more than ten years, and also whether the several irri-

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gating companies engaged in directing the water of the river are joint wrong-doers in the sense that an action will lie against the defendant company for all of the damage resulting therefrom to the plaintiff; but those questions are, as we have seen, not presented by this record and will not be examined at this time. It follows, however, from reasons stated that the decree of the district court must be reversed and the action dismissed.

REVERSED.

ROBERT HARE V. E. W. MURPHY.

FILED SEPTEMBER 18, 1895. No. 6159.

Mortgages: SALE OF PREMISES: ASSUMPTION OF DEBT. Where real estate incumbered by a mortgage is sold and conveyed and there is inserted in the deed a clause which states that the grantee assumes and agrees to pay the mortgage debt, and the deed is accepted by the purchaser of the land with knowledge that it contains the clause, or where the purchaser of land agrees, as a part of the consideration for the sale of the property to him, to assume and pay a mortgage indebtedness existing against the land, he becomes personally liable for the payment of the mortgage debt, and this is true whether his immediate grantor was so liable or not, and the liability thus created may be enforced by the mortgagee or his assigns, as it was for his or their use and benefit that such promise was made.

ERROR from the district court of Lincoln county. Tried below before NEVILLE, J.

F. S. Howell, for plaintiff in error.

Grimes & Wilcox and *T. C. Patterson*, contra.

HARRISON, J.

The plaintiff, as assignee and owner of two promissory notes, and a mortgage on certain real estate given to secure

their payment, instituted this action against the defendant, to whom the real estate had been sold by the grantee or party purchasing from the mortgagor, to recover the amount due upon the notes and mortgage, basing the suit upon a clause in the conveyance of the lands to defendant, by which it is claimed defendant assumed and agreed on his part to pay the mortgage indebtedness. The petition in the case recites that on December 26, 1889, D. A. Spraul executed and delivered to Maggie Callender two promissory notes, each in the amount of \$250, and a mortgage, to secure their payment, on tracts of land therein described and situate in Logan county. The conveyance by the mortgagor, on the succeeding day, to William L. Schuster, and the sale and conveyance of the lands again on the 31st day of December, 1889, by Schuster to the defendant E. W. Murphy, and his agreement, as a part of the consideration or purchase price of the property, to pay the indebtedness shown by the notes and mortgage, and that pursuant to such promise, and evidencing it, there was inserted in the deed of the lands by Schuster to defendant a clause in which it was stated that the real estate was incumbered and that the purchaser assumed and agreed to pay the incumbrance. It also states the purchase of the notes and mortgage by the plaintiff and their transfer and assignment to him and non-payment, etc., and closes with a prayer for judgment. The answer contained a denial of any assumption of or agreement by defendant to pay the mortgage indebtedness; a statement that defendant never received or accepted the conveyance or deed described in plaintiff's petition, and that no deed of the lands had ever been delivered to him; that he never entered into or had possession of the premises described in the petition; that a deed, a copy of which was attached to the petition, was caused to be recorded in Logan county by some person unknown to defendant and without his knowledge or consent; that there was no consideration in the purchase of the lands or the "equity" of the vendor,

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Schuster, therein for an assumption or agreement on his part to pay the amount of the incumbrances or mortgages, and further, that his grantor, Schuster, had not assumed the payment of the incumbrances, and no liability existed against such grantor for their payment. The reply of plaintiff was, in the main, a general denial of the allegations of the defendant's answer, and also stated that the deed of the lands executed by Schuster and to defendant, as grantee, was filed for record in the office of the county clerk of Logan county on or about January 2, 1890; that on or about the 7th day of January, 1890, the plaintiff, in the course of some business affairs or settlement between him and another party, was offered the notes and mortgage, the basis of this action, and their purchase by him was solicited; that he made, or caused to be made, an examination of the lands and the titles to the same, and thus discovered of record the conveyance to the defendant and the clause asserting the assumption and agreement of the defendant to pay the notes and mortgages, and also investigated or caused inquiries to be made with reference to the financial standing or circumstances of the defendant and ascertained that he was solvent, and that plaintiff, in the purchase of the notes and mortgage, was influenced by and relied upon the responsibility assumed by and of the defendant for their payment, and had it not been for the clause in the deed to defendant, which in terms bound him to such payment, plaintiff would not have purchased the notes and mortgage, and that such purchase was consummated March 1, 1890; that very soon after the deed in question was recorded, the defendant had knowledge thereof and of its contents and recitals, and possessed such knowledge at the time of its execution, and for more than thirty days prior to the date of plaintiff's purchase of the notes and mortgage, and permitted it to remain of record without any effort to have the same annulled or reformed. There was a trial of the issues to the court and a jury, and at the close of the testimony

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the trial judge instructed the jury to return a verdict for defendant, which instruction was complied with by the jury, and after motion for new trial heard and overruled, judgment was rendered, and the plaintiff brings the case here by petition in error.

Counsel for the parties, in the briefs filed, agree in the statement that the trial judge was moved to instruct the jury to return a verdict for the defendant by the following considerations: That the petition did not allege, and the evidence failed to show, that defendant's grantor was in any manner or to any extent connected with the mortgage debt, or liable or bound for the payment of it; that the rule of law applicable and governing in such cases is that a mortgage indebtedness assumption clause in a deed, or an agreement by the purchaser of lands to pay incumbrances existing against their lands, will not become operative, or is of no validity, and cannot be enforced by the mortgagee unless it further appears that the grantor in the conveyance, or the person to whom the promise is made, was personally liable for the payment of the mortgage debt. In adopting this view of the law, we think, the learned judge who presided during the trial in the district court erred. It is undoubtedly supported by decisions, many of which are cited by counsel for defendant in their brief, of courts of last resort, the opinions of which, as authority, rank among the very highest and are entitled to great weight, but we do not think best to follow them. It is an established rule of law that where one makes a promise to another for the benefit of a third person, such third person can maintain an action upon the promise, though the consideration does not move directly from him. (*Shamp v. Meyer*, 20 Neb., 223; *Sample v. Hale*, 34 Neb., 220; *Barnett v. Pratt*, 37 Neb., 349; *Doll v. Crume*, 41 Neb., 655.) In *Keedle v. Flack*, 27 Neb., 836, a case in which the right of a mortgagee to enforce such a promise as the one in the case at bar was in controversy, the rule just quoted was applied

and held to be the basis of the mortgagee's right to recover. Where a party, purchaser of lands, agrees as a part of the contract of purchase to assume and pay a mortgage debt existing against the lands, the promise so to do is for the benefit of the owner and holder of the debt and may be enforced by such party. The purchase price of the lands is the consideration moving between the purchaser and his grantor, and it is immaterial and of no consequence to the grantee that his grantor may or may not be personally liable or bound for the payment of the mortgage debt, and by such promise the promiser becomes personally liable to the mortgagee, or assigns, for the mortgage debt, regardless of whether his grantor was so liable or not. (*Merriman v. Moore*, 90 Pa. St., 78; *Dean v. Walker*, 107 Ill., 540; *Bay v. Williams*, 1 N. E. Rep. [Ill.], 340.)

There were some issues of fact in regard to which the evidence was conflicting, and if the view of the law with reference to the liability of a grantee who assumes and agrees to pay a mortgage debt, which we have announced herein as the correct one, had been taken, they should, and doubtless would, have been submitted, under proper instructions, to the jury for their consideration and determination. It follows that the judgment of the district court will be reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

JOHN GRAN ET AL. V. MARY J. HOUSTON ET AL.

FILED SEPTEMBER 18, 1895. No. 7120.

1. **Trial:** INSTRUCTIONS: REPETITION OF PROPOSITIONS. Where, in order to fairly and intelligibly present all the issues in a case to the jury by the instructions, it becomes necessary to repeat a

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proposition, its repetition, in proper connection with other facts or principles involved, is not erroneous.

2. ———: ———: ———. It is not ground for the reversal of a case that the trial court repeated a proposition of law in its instructions, where it does not appear that the effect was to perplex or mislead the jury.
3. **Intoxicating Liquors: LOSS OF SUPPORT: DAMAGES: SLOCUMB LAW: BOND OF SALOON-KEEPER.** Within the meaning of the words "all damages" in what is known as the "Liquor" or "Slocumb Law" (Compiled Statutes, ch. 50), and required by the law to be a condition of the bond given by each person licensed to sell intoxicating liquors, is included the loss of means of support of a wife and the children of the husband, who, by drinking liquors sold or given to him in whole or in part by the vendor, principal in the bond, or his agents or employes, becomes intoxicated, and, by the intoxication, disabled or disqualified, physically or mentally, either partially or totally, for labor; also his death caused by the intoxication.
4. ———: **ACTION FOR LOSS OF SUPPORT.** The action accorded by this act for the death caused by intoxication is not an action proper for the death, but for the loss of means of support resulting from the death.
5. **Action Upon Saloon-Keeper's Bond: LIABILITY OF SURETIES.** In an action upon the bond the liability of the sureties is co-extensive with that of the principal, and to the extent of the sum therein stated they are bound for the payment of all damages adjudged against him, and testimony which in such action establishes his liability fastens it upon the sureties.
6. **Statutes: RULE OF CONSTRUCTION.** It is a rule of interpretation, universally accepted, that in giving construction to a statute the court will consider its policy and the mischief to be remedied and give it such an interpretation as appears best calculated to advance its object by effectuating the design of the legislature. (*Wilber v. Paine*, 1 O., 255.)
7. **Intoxicating Liquors: ACTION ON BOND OF SALOON-KEEPER: LOSS OF SUPPORT: EVIDENCE.** "In an action on the bond of a saloon-keeper the fact essential to be shown is the disqualification to support those thereto entitled, caused or contributed to by sales of intoxicating liquors to one upon whom legally devolves the duty of furnishing such support, and this disqualification may be either partial in effect or limited in duration by reason of physical disability, or it may become complete, as by

death." Rule announced in first paragraph of *Chmelir v. Sawyer*, 42 Neb., 362, approved and followed.

8. **Instructions: HARMLESS ERROR.** Where there is no controversy in the evidence as to the existence of a particular fact, an instruction given in which there is an assumption of its truth will not furnish sufficient reason for a reversal of the judgment.
9. **Damages: FAILURE TO REQUEST PROPER INSTRUCTIONS.** An instruction given in regard to the rule for estimating damages, *held*, correct and proper to the extent that it stated the rule, and, further, that if the defendants desired a more extended or explicit statement upon any portion of the subject therein embraced, it should have been prepared and presented to the court with a request that it be read. Failure to do so precludes error.
10. **Objections to Instructions.** An objection to instruction numbered 16, in which it was stated that certain admissions were made in the answer, *held*, not well founded.
11. ———. Objections to the language employed in certain of the instructions examined, and *held* not tenable.
12. **Intoxicating Liquors: SALE TO HUSBAND: ACQUIESCENCE BY WIFE: DAMAGES.** The fact that the wife consented to or acquiesced in the sale or gift of intoxicating liquors to the husband is no defense or bar to an action for damages by the wife and in behalf of her minor children for loss of means of support through the disability or disqualification of the husband for labor caused by drinking the intoxicating liquors.
13. **Pleading.** In order to be available in an action, new matter constituting a defense must be pleaded in the answer. It cannot be introduced under a general denial.
14. **Intoxicating Liquors: DEATH BY INTOXICATION: INSTRUCTIONS.** Refusal to give instructions requested on the question of the proximate cause of the death of a person alleged to have been caused by intoxication, *held*, not erroneous within the rule announced in *McClay v. Worrall*, 18 Neb., 44, *Sellers v. Foster*, 27 Neb., 119, and *Cornelius v. Hultman*, 44 Neb., 441.
15. **Verdict: IMPEACHMENT: TESTIMONY OF JUROR.** The testimony of jurors in relation to matters which are essentially inherent in the verdict is incompetent and will not be received to impeach the verdict.
16. **Damages from Sale of Liquor: AMOUNT OF VERDICT: EVIDENCE.** The verdict, in its amount, when viewed in connection with the evidence, *held* to show that it was not the result

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of the influence of passion and prejudice, but sustained by the testimony.

17. **Trial: JURY.** The action of the court in excusing jurors *held* not erroneous.
18. **Witnesses: ORDER OF EXCLUSION: EFFECT OF DISOBEDIENCE.** Where an order has been entered excluding the witnesses and a witness is called who, it appears, has disobeyed the order and has been present in court during the examination of a prior witness, and it further appears that the evidence of the witness called will be upon a branch of the case entirely different and distinct from that testified upon by the witness preceding him and have no connection in substance therewith, and it does not appear that the party desiring to use the witness was at fault in any manner for his disobedience of the order of exclusion, it is not error for the court to allow the witness to testify.
19. **Rulings on Evidence: EXCEPTIONS: REVIEW.** In order to render an alleged error in the admission of testimony available in a review of a case by this court the record must disclose an objection made in the trial court to the introduction of the particular piece of testimony, a ruling obtained thereon, and, if adverse, an exception taken.
20. **Misconduct of Attorney: OBJECTIONS: RECORD FOR REVIEW.** Where it is assigned for error that there was misconduct of an attorney for the prevailing party during the course of argument to the jury, consisting of language used or statements made prejudicial to the rights of the adverse party, the attention of the trial court must be called to the language or statements by an objection, and, if overruled, an exception taken, and this portion of the proceedings incorporated in the bill of exceptions. It will then be reviewed by this court; otherwise not.
21. **Evidence to Show Manner of Death.** Where, so far as the evidence discloses, no one was present at the time of the death of deceased, *held*, that the evidence of the coroner, who was also a physician and surgeon, in which he stated his opinion on the subject, was admissible to show the manner of death.
22. **Trial: WITNESSES: RULING ON MOTION TO STRIKE OUT ANSWER.** Where a question is asked of a witness, and his answer, which is responsive to the question, is received without objection and motion is then made by counsel to strike out the evidence contained on the ground of its incompetency, it is discretionary with the court whether it will sustain the motion or not.

23. **Intoxicating Liquors: DAMAGES FROM SALE: EVIDENCE.**

"The fact that a saloon-keeper, prior to the sales complained of in a civil damage case, had instructed his servants not to sell liquor to the deceased, is inadmissible in evidence as not tending to prove that such sales were not in fact made." The rule announced in the third paragraph of the syllabus in *Houston v. Gran*, 38 Neb., 687, followed and adhered to.

24. ———: ———: ———. Evidence which tended to prove that the money earned by the husband while living was the source of and devoted to the support of the wife and children, *held*, admissible.

25. ———: ———: ———. The ruling of the court as to the admissibility of certain evidence during the cross-examination of one of the defendants in regard to his connection with the saloon business examined and approved.

26. **New Trial: NEWLY-DISCOVERED EVIDENCE.** A motion for new trial will not be granted on account of newly-discovered evidence, unless it would be sufficient to render clear what was before doubtful or of so controlling a nature as to probably change the verdict.

27. **Misconduct of Jury: EVIDENCE.** The statements of an affidavit in relation to the misconduct of a juror, examined, and *held* insufficient.

ERROR from the district court of Lancaster county.
Tried below before STRODE, J.

G. M. Lambertson, for plaintiff in error.

Ricketts & Wilson, *contra*.

HARRISON, J.

On the 5th day of December, A. D. 1889, Mary J. Houston, for herself and on behalf of her minor children, instituted this action in the district court of Lancaster county against John Gran, a retail dealer in liquor in the city of Lincoln, and the sureties on his bond, Jerry Harrington and Thomas Carr. In the petition it is alleged that on the 30th day of March, 1889, John Gran was engaged in the business of selling malt, spirituous, and vi-

nous liquors in the city of Lincoln, under a license authorizing him to conduct such a business, granted to him on or about the 11th day of April, 1889, by the proper authorities of the city; that on March 19, 1889, John Gran, together with Thomas Carr and Jerry Harrington, as his sureties, entered into a bond to the state of Nebraska in the sum of \$5,000, and which bond contained the conditions required by our statutory law regulating the execution of such bonds; "that on the 13th day of March, 1889, the plaintiff Mary J. Houston was, and for more than fifteen years prior thereto had been, the wife of one James Houston, now deceased, and that said Houstons were residents of the city of Lincoln, Lancaster county, Nebraska, and the other plaintiffs are their lawful children.

"4. That on the 30th day of March, 1889, the said James H. Houston, deceased, her husband and the father of the plaintiff's children, became greatly intoxicated and continued in a fit of intoxication the whole of the said day and evening of the 30th day of March, 1889, and that he spent the afternoon and evening of said day in the saloon and place of business of the defendant John Gran in said county and said state.

"5. That the defendant John Gran sold, gave, and furnished to him, the said James H. Houston, the liquors that caused his intoxication on the said 30th day of March, 1889, and furnished him the said liquors in sufficient quantities to cause his intoxication, and did cause his intoxication, and he continued to sell and furnish liquors to said James H. Houston, deceased, after he had become so intoxicated.

"6. That on the evening of the said 30th day of March, 1889, the said James H. Houston, while intoxicated from the effects of the liquors so sold and given and furnished to him as aforesaid, in so much so as to not be able to care for himself or protect his person from surrounding danger, wandered upon the tracks of the Chicago, Burlington &

Quincy Railroad Company in said city of Lincoln in the dark of the night, where he was, by reason of said intoxication and his debauched and imbecile condition caused by said liquor, run over and killed by the cars of said company, and where he was subsequently found, mutilated by the trains of said company.

"7. The plaintiffs were all dependent upon the said James H. Houston for their means of support, and the proceeds of his labor and earnings amounted to about \$1,500 per year, which he applied to the support of these plaintiffs; that he was about forty years of age, healthy, energetic, and industrious, and a skilled mechanic.

"8. The plaintiff Mary J. Houston and said minor children constitute one family, and are entirely without the means of support. The plaintiffs have sustained damages in the premises in the sum of \$5,000, together with interest thereon from the 30th day of March, 1889."

The prayer of the petition was for judgment in the sum of \$5,000, interest, and costs. To the petition Gran and his sureties filed the following answer: "They admit that John Gran was engaged in the business of selling malt, spirituous, and vinous liquors under a license duly granted by the city of Lincoln at the time and place mentioned in the petition. They also admit that they executed and delivered a bond to the city of Lincoln, and that the bond in question is described in the plaintiffs' petition, but they deny each and every other allegation contained in said petition except as herein expressly admitted." A trial of the issues resulted in a verdict against Gran and his sureties in the sum of \$100. This, in an error proceeding to this court on the part of Mrs. Houston and the children, was reversed and the case remanded to the district court. For report of this decision see 38 Neb., 687. In the second trial of the case in the district court Mrs. Houston and the children recovered a verdict for \$5,000. A separate motion for new trial was filed for Jerry Harrington and a joint one for

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John Gran and Thomas Carr, which were, on hearing, overruled and judgment rendered in accordance with the verdict. A separate petition in error has been filed in this court on behalf of Harrington and a joint one for the other two interested parties, Gran and Carr, to obtain a review of the proceedings during the trial of the case in the district court.

The first error of which complaint is made and argued in the brief filed for plaintiff in error is therein stated as follows: "The trial judge erred in the instructions given as a whole and in giving undue prominence to the idea that the amount of liquor furnished and the time when given, and the condition of the deceased as to being drunk or sober, was of little importance." It is ably and strenuously contended that the proposition that "every person who sells or gives intoxicating liquors to another, and thereby in whole or in part causes such intoxication of such person, is liable for the consequences of such intoxication" was given and many times in different form or phrase and in several instructions repeated, and thus undue prominence was given to the idea expressed, to the exclusion of other important issues in the case; that the tendency was to mislead the jury and that it had the effect of misleading the jury. As the result of a careful examination of the instructions in which any expression appears in reference to the particular idea or portion of the issues which it is claimed was unduly repeated in connection with the other instructions given and the testimony adduced during the trial, we are convinced that they are not open to the criticism made by counsel, at least not to the extent urged in the argument. It was necessary in properly instructing the jury as to the different phases of the case as presented by the evidence to embody this idea in several of the instructions; and while there may have been repetitions which were not necessities, or which in the opinion of counsel or this court were unnecessary, yet there were none which

tended, nor did they as a whole tend, to mislead the jury, nor can we believe the jury was misled by them, hence there was no prejudice to the rights of plaintiff in error, and the action of the court, the grounds for this complaint, furnishes no tenable reason for a reversal of the case. (*Seebrook v. Fedawa*, 30 Neb., 424; *Carstens v. McDonald*, 38 Neb., 858; *Hill v. State*, 42 Neb., 503.)

It is further urged that the instructions were unfair and erroneous in so far as the rights and interests of the sureties on the bond were involved, and that a distinction should be drawn between the liability of the sureties upon the bond of a liquor dealer and that of the principal, and, as against the surety, the proof that the injuries were the direct result of the intoxication caused by the principal in the bond should be of the clearest character; that, quoting from the opinion in *Curtin v. Atkinson*, 36 Neb., 110, "An undertaking will be strictly construed in favor of sureties, and their liability will not be extended by construction beyond their specific agreement." The rule announced in that case was applied to sureties on statutory bonds of retail liquor dealers. The condition of the bond required by statute to be given by a retail liquor dealer is "that he will not violate any of the provisions of this act; and that he will pay all damages, fines, and penalties and forfeitures which may be adjudged against him under the provisions of this act," (Compiled Statutes, sec. 6, ch. 50, entitled "Liquors,") and to this the sureties bind themselves. In section 15 of the same chapter it is provided: "The person so licensed shall pay all damages that the community or individuals may sustain in consequence of such traffic, he shall support all paupers, widows, and orphans, and the expenses of all civil and criminal prosecutions growing out of, or justly attributed to, his traffic in intoxicating drinks; said damages and expenses to be recovered in any court of competent jurisdiction by any civil action on the bond named and required in section 6 of this act, a copy of which, properly

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authenticated, shall be taken in evidence in any court of justice in this state;" and in section 16: "It shall be lawful for any married woman, or any other person at her request, to institute and maintain, in her own name, a suit on any such bond for all damages sustained by herself and children on account of such traffic, and the money when collected shall be paid over for the use of herself and children." It is clear that the sureties, by signing the bond, bind themselves that the principal shall pay "all damages" for which he may become liable under the provisions of the liquor act, or, as it is popularly designated, "Slocumb Law," and that such damages may accrue to any individual and be recovered by civil action on the bond, and the term "individual" includes a married woman who may sustain any damages on account of the traffic in liquors by the vendor, principal in the bond, and that her suit may be for all damages sustained by herself and her children. Within "all damages" is included loss of means of support, and within "means of support" the disability or disqualification of a husband through intemperance caused by drinking liquors, either partial or total, physical or mental, as partial or total insanity caused by intoxication and incapacitating for labor; also the death, not in an action for the death of the party, except in that its eventuating from the intoxication, causes a loss of support. The liability of the sureties with reference to the damages is co-extensive with that of the principal in the bond, and to the extent of the sum therein named they are bound for the payment of all damages adjudged against him, and the testimony which establishes a liability against him in an action on the bond fastens it upon them; and the instructions in this case which it is claimed were objectionable, and more particularly so in their effect upon the interests of the sureties, if competent and unobjectionable when viewed as affecting the rights and liabilities of the principal in the bond, were equally so as to the sureties and their liabilities arising from their contract evidenced by the bond.

Some particular stress is given by counsel, in the argument, to the use of the word "injured" in section 6 of the liquor law, in the portion thereof wherein it is stated: "Any bond taken pursuant to this section may be sued upon for the use of any person or his legal representatives, who may be injured by reason of the selling or giving away any intoxicating liquor by the person licensed, or by his agent or servant," but we think the word "injured" here is synonymous with the word "damaged," and the true reading and meaning of the part of the section referred to is "any person who may be injured,"—in other words, may suffer damage.

It is further insisted, and here we have the pith of the argument of counsel on this branch of the case, that the doctrine that any dealer who furnished any of the liquor by which intoxication was produced is liable cannot be extended or held to cover a case where death is the ultimate result of the intoxication; that this appears from section 18 of the liquor law, which is as follows: "On the trial of any suit under the provisions hereof, the cause or foundation of which shall be the acts done or injuries inflicted by a person under the influence of liquor, it shall only be necessary to sustain the action to prove that the defendant or defendants sold or gave liquor to the person so intoxicated, or under the influence of liquor, whose acts or injuries are complained of, on that day or about that time when said acts were committed or said injuries received; and in an action for damages brought by a married woman or other person whose support legally devolves upon a person disqualified by intemperance from earning the same, it shall only be necessary to prove that the defendant has given or sold intoxicating drinks to such person during the period of such disqualification." (Compiled Statutes, sec. 18, ch. 50.) That the statement "it shall only be necessary to prove that the defendant has given or sold intoxicating drinks to such person during the period of such disqualification" refers

to the disqualification of intemperance alone and does not include death, especially when strictly construed, as is contended it must be as against the sureties upon a bond. In General Statutes of 1873, section 579, chapter 58, identical with section 18, except in the last clause thereof, which is the one now under consideration, it was provided as follows: "It shall only be necessary to prove that the defendant has given or sold intoxicating drinks to such person in quantities sufficient to produce intoxication or when under the influence of liquor." In 1881 the chapter containing section 579 was repealed and the chapter, section 18 of which we have quoted, was enacted and section 579 reproduced with the exception and change we have shown. In the law as it existed in 1873 the idea was expressed that it was only when liquor had been given or sold to a person in quantities sufficient to produce intoxication, or the person was, at the time of the furnishing of the liquor, under the influence of liquor, that liability would arise. In the enactment of 1881 this was abandoned and the "contribution" idea adopted by the legislature and embodied in this later act on the subject. It was undoubtedly the intention of the law-makers in enacting the law of 1881 to pass a statute upon the subject involved complete within itself, and to embrace in particular the matter of any damages arising from the traffic licensed under its provisions, even to the quantity and quality of evidence necessary to be introduced in an action instituted therefor. Its wording is "all damages." The intent is unmistakable. To say that where the intoxication produces a partial disqualification, an action will lie; where it produces a total disability, either mentally or physically, but the mere breath of life remains, a liability arises; but where death ensues or is caused and the means of support are permanently destroyed, there is no cause of action,—would be a construction violative and destructive of the legislative intent. Although the meaning which includes the damages

for loss of support by death of the husband caused by intoxication may be said to be not strictly within the words or language employed in the phrase in relation to the proof to be adduced, it is clearly within the language of the other portion, and expressive of the apparent design of the legislature and entirely harmonious with the spirit and policy of the law; and the section in regard to evidence must be interpreted in connection with the other portions of the law and in unison with its spirit and policy, to be applicable in such an action as the one at bar, where it is predicated upon the loss of support of the wife and children claimed to have been caused by intoxication of the husband, and as against the vendor of the liquors drank, which in whole or in part caused the intoxication, or his bondsmen. It is a rule of interpretation, universally accepted, that in giving a construction to a statute the court will consider its policy and the mischief to be remedied and give it such an interpretation as appears best calculated to advance its object by effectuating the design of the legislature. (*Wilber v. Paine*, 1 O., 255.) "In an action on the bond of a saloon-keeper the fact essential to be shown is the disqualification to support those thereto entitled, caused or contributed to by sales of intoxicating liquors to one upon whom legally devolves the duty of furnishing such support, and this disqualification may be either partial in effect or limited in duration by reason of physical disability, or it may become complete, as in death." (*Chmelir v. Sawyer*, 42 Neb., 362.) The preponderance of authority and the weight of argument may be said to sustain a right of action for damages consisting of an injury to or loss of the means of support of the plaintiff, the result of the death of the husband from intoxication caused by drinking liquors. (*Smith v. Reynolds*, 8 Hun [N. Y.], 128; *Emory v. Addis*, 71 Ill., 273; *Schroder v. Crawford*, 94 Ill., 357; *Mead v. Stratton*, 87 N. Y., 493; *Hackett v. Smelsley*, 77 Ill., 109; *Davis v. Standish*, 26 Hun [N. Y.],

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608; *Rafferty v. Buckman*, 46 Ia., 195; *Chmelir v. Sawyer*, *supra*; *Roose v. Perkins*, 9 Neb., 304; *Thomas v. Hinkley*, 19 Neb., 324; *Scott v. Chope*, 33 Neb., 41; *Black*, Intoxicating Liquors, sec., 310; *Brockway v. Patterson*, 40 N. W. Rep. [Mich.], 192; *Kerkow v. Bauer*, 15 Neb., 150.)

It is assigned for error that "the court erred in giving the eighth instruction." This instruction was as follows: "If you find from the evidence in this case that the intoxication of James H. Houston was such as to deprive him of the normal use of his faculties, either physical or mental, so that he was rendered incapable of caring for himself and of protecting himself from the results of accidents or circumstances to which he was subjected, and that by reason of such deprivation of his normal powers of body or mind, his death was produced by his inability to protect or defend himself against the circumstances which threatened his life, and that his death was caused by such inability to so protect and to defend himself, then you are instructed that such intoxication is to be deemed and taken as the cause of his death." It is claimed that the court in the first sentence of the instruction assumed the fact of the intoxication of James H. Houston, and further that the instruction was inconsistent or in conflict with others of the charge in which the jury were told that if the party obtained a portion of the liquor which caused the intoxication of the defendant, it was sufficient to fix a liability upon defendant, while in this the jury were informed that the intoxication must be such as to deprive the deceased of his normal powers of body and mind and render him incapable of caring for himself. As to the first portion of the objection, there was no conflict in the evidence as to the intoxication of the deceased during a part of the day and evening prior to his death. It was a fact which was not controverted, and it was not error for the court to state it as it did in the instruction. (2 Thompson, Trials, sec. 2295.) With reference to the second objection it will suffice to say

that the court charged that the intoxication must be such as to become the cause of death, in the eighth instruction and in the others as to the liability arising from contributing to the existence of such condition, which was entirely competent and proper.

It is urged that the fifteenth instruction was erroneous, in that it told the jury that it was proper in estimating the damages to take into consideration the probable length of life of the deceased, but took no notice of the fact that the period during which the plaintiff in the action would be entitled to the support of the husband would be during their joint lives, and further, that it should have called attention to the drinking habits of the deceased. The instruction referred to was such a one as has been approved by this court in similar cases (*Roose v. Perkins*, 9 Neb., 304; *Sellars v. Foster*, 27 Neb., 118; *King v. Bell*, 13 Neb., 409), and was, to the extent that it purported to cover the issues in the case, correct; and in it the jury were told to take into consideration the habits of the deceased. If a more extended and explicit instruction had been desired upon the subject embraced in this, it should have been prepared and presented by the party, with a request that it be given. Even conceding that there was error committed in the respect claimed by counsel, *i. e.*, that there was a failure to notice and call attention to the expectancy of the joint lives of plaintiff and deceased, it may be said that it was not prejudicial to the rights of defendants. The rights of the five children, of ages ranging from three years to fifteen, were to be weighed, and in view of the sum which it was testified that deceased could earn per day, etc., the amount of the verdict cannot be said to be excessive for lack of consideration by the jury of the element which it is claimed was omitted in the instruction.

It is claimed that the court erred in giving the sixteenth instruction, in which the jury were told that if they found against the principal defendant, the saloon-keeper, they

should also find against the bondsmen, as the execution of the bond was admitted by the answer. We do not think that this objection is tenable. A fair construction of the averments of the answer in regard to the bond may, we think, be said to support the statement of the court in the instruction.

It is next claimed that the court erred in giving on its own motion the sixth, seventh, eighth, ninth, tenth, fifteenth, and sixteenth instructions, and the seventh is attacked as being erroneous and prejudicial in the portion wherein it was said: "You are instructed that if you find from the evidence that the defendant Gran, by himself or by his servants or employes, sold, gave, or furnished to said Houston intoxicating liquors in any quantity whatever, which liquors aided in producing a state of intoxication," etc., and more particularly the words "any quantity whatever," by which it is claimed the jury would be induced to believe that if liquor had been obtained by deceased in Gran's saloon, in even the smallest quantity, it would be sufficient to raise a liability. It must be remembered that the words were followed by others in which the jury received the information that the liquor, whatever the quantity, must have been sufficient to aid in producing the intoxication, and must have contributed to the intoxication. The words used were probably not the best which could have been employed, and it is probable that the idea of contribution in producing the intoxication was more finely drawn or minimized than was entirely proper, but even if this be true, in view of the evidence in relation to the point involved and sought to be conveyed by the instruction, *i. e.*, the amount of liquor, if any, furnished to Houston at Gran's saloon, we cannot believe that it misled the jury or prejudiced the rights of the complaining parties.

It is next argued that the ninth instruction proceeds upon the assumption that defendant Gran had furnished the means of intoxication. We do not think the instruction is open

to the objection urged against it. Counsel contends that the law only makes defendants liable when liquors are sold or given to the party by the dealer, his agents or servants; that other persons may have purchased liquors in Gran's saloon and given them to Houston without the knowledge of Gran, and if so the sureties would not be liable; that all the evidence agrees that Houston had no money, and if he drank in Carr's saloon the liquors were purchased by others; that defendants are only liable, if liable at all, for liquors sold or given by defendant Gran to the deceased. Without discussing the point attempted to be presented by the foregoing statement, we will say that it appears from the evidence of witnesses for both plaintiff and defendants that Houston had money and displayed it in the saloon in question on the day on which it is alleged in the petition he obtained the liquors there, and there is sufficient testimony to support a finding that he received some liquor there on that day for which he paid. The remainder of the argument under this head is mainly devoted to combating, with the vim and skill possessed by counsel, the contribution idea and the manner of its exposition and conveyance through the instrumentality of the instructions to the jury, and, as we have hereinbefore noticed and disposed of this question, it need not be further commented upon here.

It is alleged, "The court erred in giving on its own motion the eleventh instruction and in refusing to give the twelfth instruction asked by the defendants." By these instructions the question is raised of whether the consent or acquiescence of Mrs. Houston in the selling or furnishing of the liquors to her husband constituted a defense to the action, or should, if shown, be taken into consideration by the jury in estimating the damages and in mitigation thereof. The rule governing this question was announced by this court in the case of *Buckmaster v. McElroy*, 20 Neb., 557, in which it was held that a party who purchased, paid for, and drank liquors could maintain an action for damages

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resulting to himself from the intoxication produced by the liquors. The principle involved in the present case, where it is sought to interpose the consent of the wife, one of the injured parties, as a defense is the same. We are unable to agree with counsel in the proposition that there is a distinction between the two cases. The rule announced in *Buckmaster v. McElroy* was mentioned in the case of *Curtin v. Atkinson*, *supra*, in connection with other decisions involving the liability of liquor dealers, and more especially that of the sureties on the bonds of retail liquor dealers, and it was said: "And in *Buckmaster v. McElroy*, 20 Neb., 557, it was held that one who had suffered injury in consequence of his own voluntary intoxication may recover on the bond of the saloon-keeper from whom the liquor was procured. We are not disposed to recede from the position taken in previous decisions, notwithstanding the last named case has been the subject of no little criticism, particularly by Mr. Black in his recent work on Intoxicating Liquors, 291." We do not care to enter into a discussion of the reasons for and against the rule announced in the first of the two cases mentioned in this connection, but will say that we will adhere to the doctrine formerly established. The consent or acquiescence of Mrs. Houston to the giving or sale of liquors to her husband was matter constituting an affirmative defense, even if it could be allowed in any degree as a defense, and to be available must have been pleaded, and this was not mentioned in the answer, and could not have been taken advantage of under general denial, hence this assignment is clearly without merit. New matter constituting an entire or partial defense to a cause of action must be pleaded in the answer and cannot be shown or made available under a general denial. (*Mordhorst v. Nebraska Telephone Co.*, 28 Neb., 610.)

It is alleged as error that the court erred in refusing to instruct the jury as asked upon the question of proximate cause. This assignment refers to the request to give the

twelve instructions offered on behalf of the defendants, three of which were given and the rest refused. The doctrine of proximate cause as set forth in these instructions was discussed and passed upon by this court and disapproved in the case of *McClay v. Worrall*, 18 Neb., 44, also in *Sellars v. Foster*, 27 Neb., 133, and following the rule then announced the trial court did not err in refusing to give the instructions on the subject of proximate cause.

It is claimed by counsel that the verdict of the jury was evidently the result of passion and prejudice. It is argued that this is shown by an excessive verdict and the affidavits of the jurors. A careful examination of the evidence bearing on the point of the amount to be allowed, if any, convinces us that the verdict in this particular is fully sustained by the evidence and cannot be said to show, when viewed in connection with the testimony on this point, that it was fixed in amount by considerations of passion and prejudice. The affidavits of the jurors filed in support of the motion for new trial were in relation to the conversations which occurred among the jurors in the jury room after the jury had retired to consider the case, and were devoted mainly, if not entirely, to making it appear that the jurors were influenced to render the verdict by improper motives and through prejudice. The motives which finally influenced each particular juror to render a verdict must necessarily be and remain within his own conscience, and cannot be correctly judged, as a rule, by chance remarks made or heard during the arguments and conversations which take place while deliberating upon a verdict. These are matters essentially inhering in the verdict. The affidavits presented in the case at bar were objectionable in this respect and cannot be received to impeach the verdict. (*Johnson v. Parrotte*, 34 Neb., 26; *Harris v. State*, 24 Neb., 803; *Gottlieb v. Jasper*, 27 Kan., 775; *Bryson v. Chicago, B. & Q. R. Co.*, 57 N. W. Rep. [Ia.], 430.)

One of the grounds of error assigned is that the court excused one Adolph Wagner, a juror who was being examined with reference to his qualifications to serve in that capacity in this particular case, without any sufficient reason for so doing. We have carefully examined the record relating to such alleged erroneous action of the court in respect to this juror, and do not feel warranted in concluding that there was any abuse of the discretion always to be exercised by the court in the discharge of jurors during the impaneling of a jury to serve in a particular case. (*Richards v. State*, 36 Neb., 18; *Omaha & R. V. R. Co. v. Cook*, 37 Neb., 435.) In this connection we will notice the complaint that another juror was challenged and excused on the ground that he was a party defendant in a suit pending in the trial court for trial at that term. This is a statutory cause for challenge. (Code of Civil Procedure, sec. 668L.) It is contended by counsel for defendants that, while the record discloses that the juror was a party to a pending action in the trial court, it also shows that it was not at issue, and does not show that it was for trial at that term, and as a matter of fact it was not then tried. On the other hand, counsel for plaintiff contend that the case to which the juror was a party stood for trial May 7, 1894, a day of the term at which this case was tried. There was an entry in what is marked "From Law Docket, District Court, Lancaster County, Nebraska, page 53," introduced during the examination of this juror, in which appears the following: "April Term, A. D. 1894. May 7th, A. D. 1894. Day 157," in connection with the title of a cause in which the name of the juror appeared as a party defendant, upon which we presume counsel for plaintiff base the statement that the case was set for trial May 7, 1894. To us, this entry, without some explanation or further knowledge, is not intelligible, or cannot be said to contain the information claimed by counsel; but it will be presumed that the trial court understood the entry on its

own docket, and, in the absence of any definite showing to the contrary, that it acted advisedly as to the facts necessarily involved in its action in excusing the juror for the cause stated.

It appears that the witnesses were excluded from the court room during the progress of the trial, and that one J. Bush was a witness for plaintiff, and when this witness was called to the stand, counsel for defendants objected to his testifying, the following being the record of what occurred at that time:

"Jacob Bush, sworn and examined by Wilson.

"Lambertson: I object to this witness testifying, on the ground that he has been present in court this morning while the preceding witness was testifying.

"Wilson: Mr. Heaton's examination was restricted to one point and this man's examination will be restricted to the earnings of which Mr. Heaton said nothing.

"The Court: That is all you wish to prove?

"Wilson: Yes.

"The Court: Overruled, on the ground that counsel states that the witness is only to testify to earnings. Exception."

It is true that the evidence of the prior witness was on an entirely different branch of the case from the one to which the testimony of this one was directed, and it does not appear, and no claim is made, that the party calling this witness was in any way or to any degree at fault for his action, which, it is claimed, disqualified him as a witness, and because of which he should not have been allowed to testify. Under the facts and circumstances as they appear of record there was no error in allowing the witness to testify. (1 Thompson, Trials, sec. 281.)

It is alleged that the court erred in admitting a certified copy of the bond, with justification of the sureties, over the objection of counsel for defendants. In the section of the statute which provides for the taking of a bond of a

party who obtains a license to sell liquors it is also stated: "The board taking such bond may examine any person offered as security upon any such bond, under oath, and require him to subscribe and swear to his statement in regard to his pecuniary ability to become such security." Pursuant to the provisions of this portion of the section referred to, the sureties on the bond, upon which this suit was based, were required and did swear to a written or printed statement regarding their pecuniary ability to become security, and this sworn statement appeared on the bond, immediately below the signatures attached to the bond. Probably in taking the bond a prepared form was used which included in blank a form for the justification of the sureties. It is all included within the certificate of the city clerk to the copy of the bond as a part of it, but as we have only a copy, we cannot say whether it was all upon the one form or not. The record in regard to the offer and admission of the bond is as follows: "Wilson offered in evidence certified copy of the bond sued on in this case. Lambertson objected, as incompetent, immaterial, and not the best evidence; the execution not proved. Overruled and exception." The copy of the bond offered was duly certified to by the city clerk and was admissible under the provisions contained in section 15 of the liquor law, wherein it is stated: "Said damages and expenses to be recovered in any court of competent jurisdiction by any civil action on the bond named and required in section 6 of this act, a copy of which, properly authenticated, shall be taken in evidence in any court of justice in this state, and it shall be the duty of the proper clerk to deliver, on demand, such copy to any person who may claim to be injured by such traffic;" and the objection was confined to the admissibility of the bond and no reference was made to the justification, either as a portion of the paper, or in and of itself; hence, there was no error, if any committed, which is of any avail.

It is further alleged in this connection that the attorney for plaintiff in his argument to the jury made mention of the sworn statement of the sureties as to their financial responsibility and argued to some extent in respect to facts therein set forth, and that this was misconduct on his part, which was prejudicial to the rights of defendants. The portion of the record to which this complaint is directed is as follows: "In the course of the argument of Mr. Wilson for the plaintiff to the jury, and on the subject of the responsibility of the bondsmen, Mr. Wilson said: 'All the time, as far as I can find out, they have never paid one dollar upon the bond.' Lambertson: 'I object to that. There is no proof of it.' The Court: 'There is no evidence of that.' Wilson: 'Carr swears in the bond he is worth more than \$5,000 over and above all his liabilities and debts.' Lambertson: 'I object to that. That is over five years ago.' Wilson [reading from the bond]: 'The sureties being duly sworn, each for himself says he is a resident freeholder in the county of Lancaster, and is worth the sum of \$5,000 over and above all debts and liabilities which he has incurred.' Lambertson: 'What was the date of that?' Wilson: 'The date of the bond is March, 1888.'" There was also an affidavit filed on behalf of defendants purporting to state the facts and circumstances of the alleged misconduct of the attorney for the prevailing party and an affidavit in behalf of plaintiff in regard to the same matter. It will be noticed that no objection was made to the language used by counsel for plaintiff and a ruling obtained thereon. Where a question of this nature is sought to be presented to this court for review, the attention of the trial court should be directed to the language employed by counsel which is thought to be prejudicial, by an objection, and, if the objection is overruled, an exception taken and such portion of the proceedings made part of the record by the bill of exceptions. It will then be reviewed by this court. This course was not pursued in

the present case. Therefore the assignment of error will not be considered. (*McLain v. State*, 18 Neb., 154; *Bolar v. Williams*, 14 Neb., 386; *Bradshaw v. State*, 17 Neb., 147.)

It is argued that it was error for the court to allow Charles Shoemaker, the coroner, to give his opinion as to the cause of Houston's death. The question calling for his opinion was objected to, the objection overruled, and exception taken by counsel for defendants. The witness was the coroner, and as such took charge of Houston's body, and was a physician and surgeon and his evidence was admissible. (Rogers, *Expert Testimony* [2d ed.], sec. 49, [1st ed.], sec. 50.)

A question was asked of the plaintiff when testifying, which was answered without objection. Counsel for defendants then moved to strike out the answer as incompetent. This was overruled, to which counsel excepted, and the action of the trial court is now claimed to have been erroneous. The answer given was responsive to the question, and when allowed to be received without objection, whether or not the court will sustain the motion to strike it out becomes discretionary, and we have discovered nothing prejudicial to defendant's rights in the refusal of the court in this particular instance. (1 Thompson, *Trials*, sec. 718; Abbott, *Trial Brief*, 62.)

This witness was asked the following question in reference to her husband: "What was his chance of getting work when there was any brick-laying to be done, if you know?" This was objected to, as incompetent, immaterial, irrelevant, and calling for the opinion of the witness. The objection was overruled and error is assigned. The question, while probably susceptible of an interpretation by which it might be said to be calling for an opinion, has a more obvious meaning; *i. e.*, what had been his ability to get work, or was his skill in his trade such as to enable him to obtain work when there was any of the kind in progress,

and so viewing it, it was competent and not error to allow it to be answered. The answer which was given was not responsive, and not in any respect or degree prejudicial or harmful to the rights of defendants.

It is claimed that "The court erred in permitting the plaintiff to testify as to what the deceased would usually do with his money when he was paid off, and permitting her to testify as to who handled the money usually, and who bought food, clothing, and other necessities." We do not think there is any merit in this objection. The tendency of this evidence, as we read it in the record, was to prove that the money earned by the husband was the source of and devoted to the support of the wife and children and which they claimed was lost to them by his death.

The next complaint is that the court sustained an objection to the following question: "You may state whether or not any instructions had been given by you to your bartender relative to the sale or refusal to sell or give intoxicating liquors to the deceased, James Houston, prior to this date," and excluded the evidence sought to be elicited by it. This question was passed upon when this case was formerly before this court, and it was held: "The fact that a saloon-keeper, prior to the sales complained of in a civil damage case, had instructed his servants not to sell liquor to the deceased, is inadmissible in evidence as not tending to prove that such sales were not in fact made," and will now be adhered to without further discussion. (*Houston v. Gran*, 38 Neb., 687.)

During the cross-examination of Thomas Carr he was asked this question: "What capacity were you in in 1883?" [referring to what position he occupied in the saloon business], which was objected to, as incompetent, irrelevant, and immaterial. The objection was overruled and the witness answered: "I was acting as manager then." Counsel for defendant argued that the death of Houston was in 1889, and to permit the defendant Carr to be interrogated in re-

gard to his connection with the liquor business six or seven years prior to such date was prejudicial and could have been but for one purpose, that of showing that Carr was a saloon-keeper during that time, and for that reason was unworthy of belief. It had been shown by this witness during direct examination that he was manager of the saloon business March 30, 1889,—the date when it was alleged in the petition Houston obtained liquors in the saloon in question, and further, that the witness first engaged in the saloon business in 1881. We do not believe that the fact being shown of his being manager in 1883 tended to prejudice his rights in the respect argued by counsel, or in any degree, and must hold this assignment without merit.

We will next notice the statement that the court erred in permitting the following question to be answered (this refers to the cross-examination of Carr): "Since 1881 have you been operating a saloon as principal?" As shown in the record there was no objection made to this question, and the assignment, therefore, cannot be considered.

It is urged that the court erred in not granting plaintiff in error a new trial on account of newly-discovered evidence. In support of this part of the motion for a new trial affidavits were filed setting forth the facts to be proved by the newly-discovered witnesses. This evidence, according to the detailed statements in the affidavits, was cumulative in character, and it cannot be said that it would be sufficient to render clear that which was before doubtful, or of so controlling a nature as to probably change the verdict. Hence, the trial court did not err in refusing to grant this ground of the motion for new trial. (*Schreckengast v. Ealy*, 16 Neb., 510.) A new trial will not be granted on account of newly-discovered evidence merely cumulative in its character. (*Campbell v. Holland*, 22 Neb., 589; 16 Am. & Eng. Ency. of Law, 575-577.)

To support the motion for a new trial in its allegation of misconduct of the jury there appears in the affidavit of

William A. Cadman, one of the jurors on the case, the following statement: "Affiant further says that on the same day, but after the jury were discharged, the defendant Jerry Harrington came to this affiant and had a conversation with him, in which said Harrington said that he was greatly surprised at the verdict, for the reason that he was out with one of the jurors one night during the trial in which he and said juror were drinking together; that said juror said he would never permit a verdict to go against him, Harrington, and he, Harrington, was surprised that he, the said juror, had gone back on his statement." It is claimed on behalf of the defendants John Gran and Thomas Carr that this, if true, was such misconduct of the juror, referred to in the affidavit, as to disqualify him to sit as a juror and vitiated the verdict and entitled them to have it set aside and a new trial awarded. We do not view this position of counsel as tenable. There is no substantive evidence contained in the statement in the affidavit of any misconduct of the juror. The most that can be claimed for it is that it shows that the conversation occurred between the affiant and defendant Harrington, in which the latter stated that a juror had acted in a certain manner. This is wholly incompetent and insufficient. If the statements of the affidavit in regard to the actions of the juror were true, the parties to what transpired deserved punishment. Nothing appears from which it can be said the rights of Harrington's co-defendants were liable to be in any particular or degree prejudiced or for which, at their motion, the judgment should be vacated and a new trial granted. The judgment of the district court is

AFFIRMED.

GEORGE GRAVES V. NORFOLK NATIONAL BANK.

FILED SEPTEMBER 18, 1895. No. 5941.

Review: TRIAL: OBJECTIONS NOT RAISED BELOW. Where the answer in the district court was a general denial of the averments of the petition, the defendant, having urged in that court but one ground for the avoidance of the effect of his alleged indorsement of a promissory note, will not be permitted, for the first time by brief in this court, to urge that he should be held not liable on a radically different ground.

ERROR from the district court of Antelope county. Tried below before HARRISON, J.

J. F. Boyd and Allen, Robinson & Reed, for plaintiff in error.

Powers & Hays, contra.

RYAN, C.

This action was brought by the Norfolk National Bank in the district court of Antelope county, and a judgment was rendered in its favor as prayed. The plaintiff alleged as its cause of action that on or about August 30, 1887, C. F. Ellison made and delivered to the defendants George Graves and John M. Leeper, under and by the name of Graves & Leeper, his promissory note for the sum of \$400, drawing ten per cent per annum, due August 31, 1888; that before the maturity thereof the payees indorsed their names on said promissory note; that said George Graves and John M. Leeper were liable on said note as indorsers; that it was, at the time the suit was brought, wholly unpaid, and had been duly protested and notice of non-payment had been duly given each indorser. By an amendment to the petition it was averred that Graves & Leeper had no partnership property at the time

the amendment was made, and had had none since plaintiff had become the owner of the note with respect to which it was alleged that they were liable as indorsers. The answer was a general denial and was made by George Graves alone. The trial was to a jury. The evidence showed that on June 1, 1885, George Graves and John M. Leeper entered into a copartnership relation for the purpose of dealing in live stock, and particularly in horses; that notice of this partnership was filed with the county clerk of Antelope county, in which notice it was stated that the object of the partnership was as above described, and that the firm name and style was Graves & Leeper; that on February 4, 1888, a notice of the dissolution of this partnership firm, signed by both parties, was inserted in a newspaper published at Oakdale, in Antelope county. It was also shown that the note sued upon was given for horses sold by the above named firm; that while there was published the above notice of dissolution no knowledge of a dissolution of this firm was possessed by the bank at the time it purchased the above described note; that the bank before it purchased this note had purchased a like note from Graves & Leeper, and, as collateral to the note purchased, had taken assignments of about \$3,300 in notes, or thirty-three notes aggregating that amount, the president of the bank could not say which, and that nearly all of these were payable to Graves & Leeper, and, with the assent of both these gentlemen, were indorsed in like manner as was the note in respect to which they were herein sought to be held as indorsers. The contention on the trial, as disclosed by the bill of exceptions, was as to the propositions last above indicated, that is, whether it was so customary to indorse to plaintiff notes made to Graves & Leeper in the same manner as was made the indorsement upon which this suit was brought, that plaintiff was justifiable in purchasing this note as he did and accepting the indorsement of the defendant Graves, appearing thereon when presented, as hav-

ing been duly authorized. When the note and the evidence of protest accompanying it were offered in evidence, the bill of exceptions recites that there was no objection made to either. The objections to the admission and rejection of testimony were of a character which shows clearly upon what line the defense was made, as the following example will serve to illustrate: Mr. Rainbolt, president of the bank, was asked if the note had been indorsed when presented to him for discount, and how it was indorsed. Mr. Graves was not permitted to testify whether or not he had ever authorized any one to make the particular indorsement upon which he had been sued, and that the firm of Graves & Leeper or the witness himself had never received any benefit from the sale of said note. It is possible that under certain conditions of the proofs the proposed testimony of Mr. Graves might have been proper, but it was not when offered, for there was no attempt to prove that Graves had specially authorized Leeper to indorse his name, and whether the proceeds were properly applied was not a matter with which the bank was chargeable, provided the discount upon the faith of the indorsement of Graves was justified by the facts.

There was one instruction given by the court which defined the issues presented by the pleadings. With this exception all instructions were addressed to rules applicable to the consideration of the above indicated questions of fact, which, as has already been said, had been the grounds of contention throughout the trial. On behalf of the defendant Graves no instructions whatever were requested. The instructions given were in no respect faulty; if other instructions were necessary they should have been asked. There was no intimation, however, that there would be a question made as to the form of the indorsement, so far as we can discover, until that point was presented in the brief filed on behalf of Graves, the plaintiff in error, in this court. The principal argument made in this brief is that

the note was made to the partnership firm as such and that the indorsements thereon purport to be of individuals alone, and that, therefore, these indorsements not being those of a payee or indorsee, the individuals whose names are indorsed are not liable as indorsers, for only the firm could be so held. It is hardly fair to the district court to raise such a question for the first time in this court. In *Hawley v. Robeson*, 14 Neb., 435, there were under consideration alleged errors of the district court in respect to an error proceeding brought thither from a justice of the peace, and COBB, J., delivering the opinion of this court, said: "It does not appear that any exception was taken to the bill of exceptions in the district court. The case is brought here for a review of the rulings and judgment of the district court, in which it is alleged there is error. While it is unnecessary to say here—and it is not said that this court will in no case consider objections or points not raised in the court immediately below—yet it may be safely said that no technical point, or one involving mere matter of form, will be considered by this court when raised here for the first time." The point now insisted upon is so far technical in its nature that it should have been insisted upon to some extent in the district court to entitle it to be considered in this court.

The jury found upon questions of fact in favor of the defendant in error, and as thereby was settled all matters really contested, the judgment of the district court is

AFFIRMED.

HARRISON, J., not sitting.

WILLIAM A. POLLOCK V. DAVID W. WHIPPLE.

FILED SEPTEMBER 18, 1895. No. 5905.

1. **Pleading:** ELECTION AS TO COUNTS: PRACTICE. Error cannot be predicated on the refusal of a district court to compel the plaintiff to elect on which one of two causes of action set out in his petition he will proceed to trial when the two causes of action are identical. The remedy of a defendant in such a case is to move the court to strike out one of the causes of action as surplusage.
2. **Sales:** BONA FIDE PURCHASERS. One who purchases personal property from a conditional vendee, contractee, or lessee in possession thereof, with actual knowledge of the conditions on which his vendor holds possession of such property, is not an innocent purchaser thereof and acquires only such title as his vendor had.

ERROR from the district court of Cedar county. Tried below before NORRIS, J.

Barnes & Tyler, H. A. Miller, and Wilbur F. Bryant, for plaintiff in error.

John Bridenbaugh and J. S. Lothrop, contra.

RAGAN, C.

On December 9, 1885, D. W. Whipple entered into a contract in writing with Sylvester K. Smith and wife in and by which he leased or bailed to them seventeen head of cows and heifers. By the terms of the contract Smith and wife were to return to Whipple, on the 1st of March, 1890, thirty-four head of cows and heifers. The contract further provided that Smith and wife should not sell or dispose of any of the cattle or their increase let or bailed to them without the consent of Whipple, and if they did so the contract should terminate and Whipple have authority to

take possession of the cattle. Mrs. Smith was the daughter of Whipple, and at the time of the making of this contract resided on a farm of Whipple's in Cedar county. Whipple furnished Smith and wife with seventeen head of cows and heifers, which, with their increase, were kept on the farm upon which Smith resided. In the spring of 1889 these cows and heifers and their increase amounted to about forty head. About that time Smith made a bill of sale of all the cattle in his possession to W. A. Pollock in payment of a debt owing to the latter by Smith, and Pollock took possession of all the cattle on the Smith farm, and Whipple then brought this suit in replevin in the district court of Cedar county against Pollock for said cattle and their increase. There was a trial to a jury, with a verdict and judgment in favor of Whipple, to reverse which Pollock prosecutes to this court a petition in error. Of the errors assigned we notice the following:

1. That the court erred in overruling Pollock's motion to require Whipple to elect on which of the two causes of action set out in his petition he would proceed to trial. The petition contains but one cause of action. It alleges that Whipple is the owner and entitled to the immediate possession of certain cattle, describing them, and contains the usual allegations that the property is wrongfully detained from the possession of the plaintiff by the defendant, to his damage, etc. The second count or cause of action in the petition is identical with the first, except that it sets out the contract referred to above entered into between Whipple and Smith and wife by which the cattle were let or bailed to the latter, and that Pollock had actual knowledge of the contents of this contract before his unlawful taking possession of the cattle replevied. Counsel might have moved the court to strike out of this petition one of the so called causes of action as surplusage, and had they done so no doubt the motion would have been sustained. But the court did not err in refusing to compel Whipple to

elect on which of the two so called causes of action set out in his petition he would proceed to trial.

2. The second assignment is that the court erred in admitting in evidence the contract for the letting or bailing of the cattle between Whipple and Smith and wife. We do not think the court erred in admitting this contract in evidence. The principal question in this action, as in every other action of replevin, was whether Whipple at the time he brought this suit was entitled to the possession of the property replevied. The contract between him and Smith and wife, by which he let or bailed to the latter the seventeen head of cows and heifers, and in consideration of which they agreed to return to him thirty-four head of cows and heifers, and by the terms of which they agreed that in case they sold or disposed of any of the property that he should be entitled to take possession of the seventeen head of cows and heifers and their increase, was a material link in the chain of evidence necessary to be produced by Whipple to support the allegations of his petition that at the time the suit was brought he was the owner and entitled to the possession of the property replevied.

3. That the court erred in giving instructions 3, 5, 6, and 7 on his own motion. We have examined the instructions assailed far enough to ascertain that one of the instructions complained of was properly given, and as the assignment is that the court erred in giving all the instructions it is accordingly overruled.

4. The fourth assignment is that the court erred in giving instructions 1 and 3 at the request of Whipple. Instruction No. 1 complained of was properly given, and for the reason stated above the assignment cannot be sustained.

5. The fifth assignment is that the court erred in refusing instructions 1, 2, 3, and 4 requested by Pollock. The second instruction complained of is in the following language: "The plaintiff claims title to the property and the right to the possession thereof under and by the terms of

the contract or agreement in evidence herein, signed by Sylvester K. Smith and Mrs. Sylvester K. Smith. And you are instructed as a matter of law that if you find from the evidence that said contract was violated by the parties signing it, plaintiff can only recover so much of the stock in controversy herein as is shown to be a part of the original cattle delivered by the plaintiff to said Smith and wife at the time the said contract was executed. The plaintiff is not entitled to recover the increase, if any, thereof, nor other cattle except the identical animals so delivered to said Smith and wife." By this instruction the court was requested to tell the jury that if Smith and wife had violated their contract of the letting or bailment of the original cattle by selling any of the original cattle or their increase that Whipple could only recover the original cattle let or bailed. We think this an incorrect interpretation of the contract between Whipple and Smith and wife. By the terms of that contract, if Smith and wife, without Whipple's consent, sold or disposed of any of the original cattle or their increase, then Whipple was "to have the power to take possession of the stock." We conclude, therefore, that the court did not err in refusing to give the instruction quoted above, and as the assignment is that the court erred in giving all the instructions mentioned it is overruled.

6. The sixth assignment is that the verdict is not sustained by sufficient evidence. The principal issue litigated at the trial related to the identity of the cattle replevied and the cattle and their increase originally let or bailed by Whipple to Smith and wife. The evidence on this issue was conflicting, but it sustained the finding of the jury that the cattle replevied were the original cattle and their increase let or bailed by Whipple to Smith and wife. Some attempt was made at the trial to place Pollock in the position of a purchaser for value without notice, but this was a signal failure. The evidence discloses beyond all question that Pollock had actual knowledge of the existence and the con-

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tents of the contract between Whipple and Smith and wife, by which the latter had possession of the said seventeen head of cows and heifers and their increase. Indeed, it appears from Pollock's own evidence that he had the contract in his possession prior to the time he took the bill of sale from Smith under which he claims title to the cattle in controversy. He seems to have held this contract as collateral security for a debt which Smith owed him. Pollock does not then come within the protection afforded by the statute to innocent purchasers of personal property from a conditional vendee, contractee, or lessee thereof. Smith and wife had possession of these cattle, but they did not have title to them, and they could convey to Pollock no greater title than they themselves possessed. The verdict and judgment rendered in this case are amply supported by the evidence and the judgment of the district court is

AFFIRMED.

J. B. DICKEY, APPELLANT, v. THOMAS B. PATERSON ET AL., APPELLEES.

FILED SEPTEMBER 19, 1895. No. 6478.

Validity of Tax Deeds. The provision of section 127 of the revenue law, for the execution of tax deeds under the hand and official seal of the county treasurer, being mandatory, it follows that there is under existing laws no authority for a valid conveyance by said officer of lands sold for delinquent taxes. (*Larson v. Dickey*, 39 Neb., 465.)

APPEAL from the district court of Douglas county.
Heard below before IRVINE, J.

Saunders, Macfarland & Dickey, for appellant.

Howard B. Smith, contra.

POST, J.

This was an action by the appellant in the district court of Douglas county for the purpose of quieting his title to the east half of lot No. 97, and all of lot No. 98, in Gise's addition to the city of Omaha. The basis of the plaintiff's claim to the property described is a treasurer's tax deed executed September 14, 1889, in which it is recited that said property was, on the 1st day of August, 1887, sold for delinquent taxes for previous years. On final hearing before the district court the petition was dismissed and a decree entered in accordance with the prayer of the defendant's cross-bill, quieting his title as against the plaintiff upon the satisfaction of the latter's claim on account of money paid for taxes.

It is sufficient on this appeal to notice one of the many objections to the tax deed above mentioned as a basis of the plaintiff's claim of title, viz., that it is not attested by the official seal of the county treasurer. In *Larson v. Dickey*, 39 Neb., 463, it was held (1) that the provision of section 127 of the revenue law, requiring tax deeds to be executed under the official seal of the county treasurer; is mandatory; (2) that in the absence of a provision for a seal by said officer, he is without authority to consummate the sale of lands for taxes by the execution of valid deeds therefor. That decision, which is not only the reasonable and natural construction of the revenue law, but the logical and necessary result of previous cases, is decisive of this controversy. It follows that the decree of the district court must be

AFFIRMED.

IRVINE, C., not sitting.

NELLIE FRANK BENTON V. GERMAN-AMERICAN NATIONAL BANK OF KANSAS CITY, MISSOURI.

FILED SEPTEMBER 19, 1895. No. 5754.

1. **Negotiable Instruments: CONTRACTS OF INDORSEMENT: LIABILITY OF MARRIED WOMEN: CONFLICT OF LAW: LEX LOCI.** A married woman and her husband were citizens and residents of the state of Missouri. The wife there indorsed, as an accommodation merely, the promissory note of the husband payable to a bank in that state. The statutes of Missouri in force at the date of the execution of said contract of indorsement provided: "A married woman shall be deemed a *femme-sole* so far as to enable her to carry on and transact business on her own account, to contract and be contracted with, to sue and be sued, and to enforce and have enforced against her property such judgments as may be rendered for or against her, and may sue and be sued at law or in equity with or without her husband being joined as a party." (Revised Statutes, Mo., sec. 6864, ch. 109.) In a suit at law in this state against the wife on her contract of indorsement, *held*, (1) that the contract of indorsement should be construed and governed and the married woman's liability thereon determined by the laws in force in the state of Missouri at the date of the execution of the contract of indorsement, and not by the laws of the state of Nebraska.
2. ———: ———: ———: **EVIDENCE.** That the evidence established that the contract of indorsement in the state where made was neither void nor voidable by the married woman because of her coverture, and was as valid and binding upon her as though she had been a man.
3. ———: ———: ———. The contract having been made by a married woman, a citizen of another state, and being a valid and binding contract under the laws of that state, the fact that it was not made with reference to or upon the faith and credit of her separate estate or business afforded no sufficient reason why the contract should not be enforced by the courts of this state.
4. ———: **EXTENSION OF TIME FOR PAYMENT: PLEDGES.** Evidence that notes deposited as collateral security for the payment of other notes were from time to time renewed, interest collected thereon in advance, and the time of payment extended will not of itself support a finding that the holder of such original notes thereby extended their time of payment.

ERROR from the district court of Douglas county. Tried below before DAVIS, J.

The facts are stated by the commissioner.

A. S. Churchill, for plaintiff in error:

The transaction should be governed by the law of Nebraska. Plaintiff in error is not liable, for the reason she did not contract with reference to her separate estate. (*Gillespie v. Smith*, 20 Neb., 455; *Barnum v. Young*, 10 Neb., 309; *State Savings Bank of St. Joseph v. Scott*, 10 Neb., 84; *Davis v. First Nat. Bank*, 5 Neb., 242; *Hale v. Christy*, 8 Neb., 264; Wharton, *Conflict of Laws* [2d ed.], sec. 273; *Boyce v. Grundy*, 9 Pet. [U. S.], 289; *Norris v. Chambres*, 29 Beav. [Eng.], 246; *Kerr v. Moon*, 9 Wheat. [U. S.], 565; *United States v. Crosby*, 7 Cranch [U. S.], 115; *McGoon v. Scales*, 9 Wall. [U. S.], 23; *Loving v. Pairo*, 10 Ia., 282; *Doyle v. McGuire*, 38 Ia., 410; *Friereson v. Williams*, 57 Miss., 451; *Shacklett v. Polk*, 51 Tenn., 104; *Odell v. Rogers*, 44 Wis., 138; *Chapman v. Robertson*, 6 Paige [N. Y.], 627; *Sell v. Miller*, 11 O. St., 331; *United States v. Fox*, 94 U. S., 315; *Brine v. Hartford Fire Ins. Co.*, 96 U. S., 627.)

Plaintiff in error is released, because the time of payment was extended for a valuable consideration without her consent. It was error to direct a verdict for plaintiff below. (*Atchison & N. R. Co. v. Bailey*, 11 Neb., 332; *Smith v. Sioux City & P. R. Co.*, 15 Neb., 583; *Johnson v. Missouri P. R. Co.*, 18 Neb., 690; *Blake v. White*, 1 Young & C. [Eng.], 420; *Walters v. Swallow*, 6 Whart. [Pa.], 446; *Scott v. Saffold*, 37 Ga., 384.)

James W. Carr, also for plaintiff in error.

Isaac E. Congdon and Haff & Van Valkenburg, contra:

Plaintiff in error became liable to the defendant in error

by her indorsement of the notes. She has been sued in the proper form under the laws of Nebraska. The courts of Nebraska should enforce her liability which accrued and became fixed in Missouri. (*Thurston v. Rosenfield*, 42 Mo., 474; Story, Conflict of Laws, sec. 241; Wharton, Conflict of Laws, secs. 96, 101, 119, 401, 419; *Meyers v. Van Wagoner*, 56 Mo., 115; Revised Statutes, Mo., sec. 6864, ch. 109; *Osborne v. Doherty*, 38 Minn., 430; *Lom-ersan v. Johnston*, 44 N. J. Eq., 93; *Bowery Nat. Bank v. Sniffin*, 7 N. Y. Sup., 520; *Sypert v. Harrison*, 88 Ky., 461; *Robinson v. Queen*, 87 Tenn., 445; *Bell v. Packard*, 69 Me., 105; *Binney v. Globe Nat. Bank*, 150 Mass., 574; *Milliken v. Pratt*, 125 Mass., 374; *Bank of Louisiana v. Williams*, 46 Miss., 618; *Thompson v. Ketcham*, 8 Johns. [N. Y.], 189; *Delahaye v. Heitkemper*, 16 Neb., 475; *Joslin v. Miller*, 14 Neb., 93; *Olmstead v. New England Mortgage Security Co.*, 11 Neb., 487.)

RAGAN, C.

The German-American National Bank of Kansas City, Missouri, (hereinafter called "the bank,") brought this suit in the district court of Douglas county against Mrs. Nellie Frank Benton on her indorsement of certain promissory notes previously made by certain parties and delivered to the bank. The notes and Mrs. Benton's contract of indorsement were executed and delivered in the state of Missouri, the notes were payable there, and Mrs. Benton was at the time a married woman and a citizen and resident of said state. The jury, in obedience to an instruction of the district court, returned a verdict in favor of the bank and against Mrs. Benton for the amount due upon the notes. To reverse the judgment pronounced against her upon this verdict Mrs. Benton has prosecuted to this court proceedings in error.

1. One of the defenses to the action interposed by Mrs. Benton in the court below was that the bank, without her

knowledge or consent, had granted to the makers of the notes indorsed by her an extension of time of payment; and it is now insisted that the court erred in instructing the jury to return a verdict in favor of the bank because there was sufficient evidence introduced at the trial to support a finding of the jury that such extension of time for the payment of the notes had been given by the bank to the makers thereof as pleaded by Mrs. Benton. The evidence, and all the evidence, is in substance that some time after the notes indorsed by Mrs. Benton had matured that some of the makers or indorsers of said notes deposited with the bank as collateral and additional security for said notes certain other notes. These collateral notes were from time to time by the bank renewed, their time of payment extended, and interest collected thereon in advance; but these facts did not constitute a contract of extension of time of payment of the notes indorsed by Mrs. Benton. The district court then did not err in directing the jury to find a verdict against Mrs. Benton in so far as this defense is concerned.

2. At the trial, counsel for Mrs. Benton requested the district court to instruct the jury as follows: "You are instructed that the defendant being a married woman at the time she signed the notes in question, she will not be liable for the payment thereof unless it was given with reference to and on the faith and credit of her separate property and estate." The refusal of the district court to give this instruction is now assigned as error. The argument is that the pleadings and evidence conclusively establish that Mrs. Benton at the time she executed the contract of indorsement on which she is sued was a married woman, and that such contract of indorsement was not made by her with reference to or upon the faith and credit of her separate estate or business, and that therefore the contract is voidable by her at her election. We assume that counsel is correct in his contention as to what the pleadings

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and evidence establish, and for the purposes of this case only we assume that had the contract of indorsement been made by Mrs. Benton in this state, she being then and there a citizen and resident of this state and a married woman, such contract would have been voidable at her election, unless it appeared that such contract was made by her with reference to and upon the faith and credit of her separate property or business; but the contract made by Mrs. Benton was made in the state of Missouri. Mrs. Benton was a citizen of that state at the time, and the contract was to be performed in that state. Clearly, then, such a contract as this is to be construed and governed by the laws of the state where made, and not by the laws of the state of Nebraska. In *Robinson v. Queen*, 87 Tenn., 445, a married woman, domiciled in the state of Kentucky, signed a note there as surety for her husband. She was afterwards sued on this note in the state of Tennessee. She pleaded her coverture as a defense to the action, and the question arose whether her contract was to be construed and her liability thereon determined by the laws of Tennessee or Kentucky, and the supreme court of the state of Tennessee said: "The first question to be disposed of in this cause is whether a married woman, domiciled in the state of Kentucky, is liable in the courts of this state upon a note made by a firm of which her husband was a member, and executed by her as surety for such firm, where under the laws of Kentucky she had, before the execution of the note, been emancipated from all the disabilities of coverture, and clothed with all the powers of a *femme-sole*, so far as the right to contract and to sue and be sued was concerned. This inquiry we answer in the affirmative. Though some authorities may be found to the contrary, it may now be said to be well-settled law that the validity of a contract, the obligation thereof, and capacity of the parties thereto is to be determined by the *lex loci contractus*, * * * unless there be something in the contract which is deemed

hurtful to the good morals, or injurious to the rights, of its own citizens by the laws of the state or country whose courts are called upon to enforce the contract made in a foreign state or country. The notes involved in this suit were made in Kentucky, payable there, the makers and payees resident there, and, as we have already stated, were valid there, and binding and enforceable against the married woman as fully as if she were a *femme-sole*." We think this is a correct statement of the law, and that the contract of indorsement made by Mrs. Benton is to be construed and governed and her liability thereon determined by the laws in force in the state of Missouri at the date of the execution of the contract of indorsement. On the trial of this action there was introduced in evidence the statutes of the state of Missouri on the subject of the power of married women to enter into contracts and their liability for contracts made by them. So much of the said statutes as is material here is as follows: "A married woman shall be deemed a *femme-sole* so far as to enable her to carry on and transact business on her own account, to contract and be contracted with, to sue and be sued, and to enforce and have enforced against her property such judgments as may be rendered for or against her, and may sue and be sued at law or in equity with or without her husband being joined as a party." (Revised Statutes, Mo., sec. 6864, ch. 109.) Here then is evidence that under the laws of Missouri the contract of indorsement made there by Mrs. Benton was neither void nor voidable because of her coverture, but was as valid and binding upon her as though she had been a man; and since the contract of Mrs. Benton was valid and binding in the state where made, the record contains no suggestion of a reason why it should not be enforced by the courts of this state, even though it was not made with reference to or upon the faith and credit of her separate estate or business. We conclude, then, that the learned district judge was right in refusing to give the instruction.

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There are some other points argued by counsel for Mrs. Benton in his brief, but it would subserve no useful purpose to examine them, as the judgment of the district court is the only one that could have been correctly rendered under the evidence in the case and the law applicable thereto. The judgment of the district court is

AFFIRMED.

ANDREW DEBNEY V. STATE OF NEBRASKA.

FILED OCTOBER 1, 1895. No. 6807.

1. **MURDER: TIME COMMITTED.** The crime of murder is regarded as having been committed at the time when the fatal blow or wound is inflicted, although the death occurs on a subsequent date, and the party is to be tried by the laws in force at the time the injurious act is done.
2. **CRIMINAL LAW: ERRONEOUS INSTRUCTIONS: HARMLESS ERROR.** It is not reversible error to give an erroneous instruction where it could not have prejudiced the complaining party.
3. **HOMICIDE: DELIBERATION.** *Held*, That the eighth instruction defining the term "deliberation" was as favorable to the accused as he was entitled to have given.
4. **CRIMINAL LAW: REVIEW OF INSTRUCTIONS.** Instructions given to a jury should be construed together; and if, when so considered as a whole, they properly state the law, it is sufficient.
5. —: **INTOXICATION.** *Held*, That the twenty-fourth paragraph of the charge to the jury, upon the subject of intoxication, is applicable to the evidence adduced on the trial.
6. **MURDER: CONVICTION: SUFFICIENCY OF EVIDENCE.** Evidence *held* to sustain a conviction for murder in the first degree.
7. **CRIMINAL LAW: ADDRESS OF COUNSEL: APPLAUSE BY BY-STANDERS.** When the county attorney finished his closing address to the jury some of the by-standers, without the knowledge or connivance of any one connected with the prosecution, applauded, which was quickly suppressed by the presiding

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judge, and who administered a rebuke to the persons making the applause. *Held*, That the record failed to disclose that the defendant was prejudiced by the demonstration.

ERROR to the district court for Nance county. Tried below before SULLIVAN, J.

The facts are stated in the opinion.

Reid & Morgan, M. V. Moudy, and Albert & Reeder, for plaintiff in error:

The accused was entitled to the benefit of the provision of the act passed in 1893, fixing the punishment for murder in the first degree at death or imprisonment for life, at the discretion of the jury. (State Constitution, sec. 24, art. 3; 15 Am. & Eng. Ency. Law, 712; *Brown v. Williams*, 34 Neb., 376; Bishop, Written Law, sec. 110a.)

Murder cannot be committed until the injured person dies. (1 Wharton, Criminal Law [8th ed.], sec. 538; Criminal Code, sec. 254; *Heldt v. State*, 20 Neb., 493; 4 Am. & Eng. Ency. Law, 723.)

The twelfth paragraph of the charge to the jury is erroneous. (*Heldt v. State*, 20 Neb., 493; *Long v. State*, 23 Neb., 33.)

The eighth instruction of the court defining the word "deliberation" is erroneous. (*Simmerman v. State*, 14 Neb., 570; *Milton v. State*, 6 Neb., 136; *Craft v. State*, 3 Kan., 450.)

The twenty-fourth paragraph of the charge in reference to intoxication is erroneous. (*Smith v. State*, 4 Neb., 277; *Ballard v. State*, 19 Neb., 609; *Clark v. State*, 32 Neb., 246; *Union P. R. Co. v. Ogilvy*, 18 Neb., 639; *Walrath v. State*, 8 Neb., 90; *City of Crete v. Childs*, 11 Neb., 252; *Dunbier v. Day*, 12 Neb., 596; *Bowie v. Spaid*, 26 Neb., 635; *Farmers Loan & Trust Co. v. Montgomery*, 30 Neb., 33; *Bain v. Wilson*, 10 O. St., 17; *Union Central Life Ins. Co. v. Cheeber*, 36 O. St., 210.)

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The applause after the county attorney's closing argument prevented a fair and impartial trial. (*Carr v. State*, 23 Neb., 749.)

A. S. Churchill, Attorney General, for the state.

NORVAL, C. J.

An information was filed by the county attorney in the district court of Nance county, charging the plaintiff in error, Andrew Debney, with murder in the first degree. The prisoner was found guilty as charged, and was by the court sentenced to be hanged, which judgment he seeks to reverse by this proceeding.

It appears from the record before us that the plaintiff in error and his wife, Catherine Debney, being unable to live happily together, a separation took place. Subsequently, a reconciliation was brought about, and, after a time, a second separation occurred. Afterwards, on the 4th day of July, 1893, the accused went to the place where his wife was staying in Nance county and asked her if she would go home with him, and she replied she would not. He then inquired if she never intended to go with him, and upon receiving a negative answer he drew his revolver and shot at his wife five times, three of the balls penetrating her body. After she fell to the ground he jumped upon her and stamped her head and breast. From the wounds thus inflicted Mrs. Debney died in Platte county on the 9th day of the same month. The verdict of the jury found the prisoner guilty of murder in the first degree, but did not fix the penalty.

The first question argued by counsel is whether the accused was entitled to the benefit of the amendment to section 3 of the Criminal Code adopted by the legislature of 1893, fixing the punishment for murder in the first degree at death or imprisonment in the penitentiary for life, in the discretion of the jury. The act of the legislature contain-

ing the aforesaid amendment to the Criminal Code contained no emergency clause; therefore, under the provisions of section 24, article 3, of the state constitution, it did not become operative until three calendar months after the adjournment of the session of the legislature at which it was enacted. The twenty-third legislative assembly finally adjourned on the 8th day of April, 1893, and it is contended by counsel for plaintiff in error that the act, to which reference is made above, went into effect at the expiration of three calendar months from such adjournment, or on July 9, 1893, the day on which the death of Mrs. Debney occurred. On the other hand, the attorney general argues that the amendment did not go into effect until August 1, 1893. In other words, that the "three calendar months" begins to run at the expiration of the month within which the legislature adjourned *sine die*. In our view it is unnecessary, indeed it would be quite out of place, to decide at this time between these conflicting positions of counsel, or to review their arguments or the authorities cited in support thereof, since the time when the amendment of 1893 to section 3 of the Criminal Code went into force does not on the record arise in this case, unless the crime with which the plaintiff in error is called upon to answer was committed on July 9, the day Mrs. Debney died, and not on the 4th day of the same month, when the fatal wounds were inflicted. Undoubtedly the concurrence of both the wounds and the consequent death were necessary for the consummation of the crime of murder, for until death ensues the crime is not complete. The question has been frequently before the courts for adjudication, where is the crime committed when the wounds or blows and the death resulting therefrom occur in different counties or states? The great weight of the decisions hold that, independent of any statutory provision upon the subject, the crime is committed, and is punishable in the jurisdiction, where the fatal wound or blow is given. In other words,

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that it is not the place of the death, but the place where the criminal act is perpetrated to which the jurisdiction to try and punish is given. It was the inflicting of the fatal wounds by the prisoner, coupled with the requisite contemporaneous intent or design, which constituted the felony, the subsequent death of Mrs. Debney being a result or consequence rather than a constituent element of the offense. The doctrine is stated thus by Mr. Bishop, section 51, volume 1, of his work on Criminal Procedure: "The true view appears to be that the blow is murder or not, according as it produces death within a year and a day or not; and, therefore, in all cases an indictment lies in the county where the blow was given." To the same effect see 1 Wharton, Criminal Law, 292; Kerr, Homicide, sec. 226; *Rex v. Hargrave*, 5 Car. & P. [Eng.], 170; *Green v. State*, 66 Ala., 40; *State McCoy*, 8 Rob. [La.], 545.

In *Riley v. State*, 28 Tenn., 645, it was held that the venue is proved in a murder case by establishing that the mortal blow was inflicted in the county in which the prosecution is brought, without proving the county where the deceased died. Green, J., in delivering the opinion of the court, says: "For although at common law it was said the offense was not complete until the death, yet it would be doing violence to language to say that the offense was committed in the county where the death happened, although the strokes were given in another county. * * * East says the common opinion was that he might be indicted where the stroke was given. That alone is the act of the party. He commits this act and the death is only a consequence."

United States v. Guiteau, 1 Mackey [D. C.], 498, was a prosecution for the murder of President Garfield. In that case the fatal shot was fired in Washington, in the District of Columbia, from which the president died three months later at Elberon, in the state of New Jersey. Guiteau was indicted and tried for the crime in the District of Colum-

bia. The point was made in the case that the court had no jurisdiction, on the ground that the crime was committed at the place where the death occurred. The court, in an opinion by Justice James, held that the murder was committed within the District of Columbia, since the fatal wound was given there, although the consequent death happened without the district and in one of the states.

State v. Kelly, 76 Me., 331, was a prosecution for murder. The wound which produced the death was inflicted within the limits of Fort Papham, a fort of the United States, from the effects of which wound death ensued at Phippsburg outside the limits of the fort. It was held the crime was committed where the mortal blow was given, and not where the person died. The court, in the opinion, observe: "But it is said that, although a mortal wound may be inflicted within a fort, still, if the person wounded dies elsewhere, the crime must not be regarded as having been committed in the fort, but at the place where the person dies, and that in such a case the courts of the latter place have jurisdiction. It is undoubtedly true that the courts of the latter place do sometimes have jurisdiction; but we are satisfied that when this is so, it is not because the crime is regarded as having been committed there, but because some rule of law, statutory or otherwise, expressly confers such jurisdiction. The modern and more rational view is that the crime is committed where the unlawful act is done, and that the subsequent death, while it may be sufficient to confer jurisdiction, cannot change the locality of the crime."

State v. Carter, 3 Dutch. [N. J.], 499, was an indictment for murder. The blows were struck in Hudson county, New York, from which the injured party died in New Jersey, where the prosecution was brought. Vredenburgh, J., in speaking for the court upon the question of jurisdiction, uses this language: "The only fact connected with the offense alleged to have taken place within

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our jurisdiction is that after the injury the deceased came into, and died in, this state. This is not the case where a man stands on the New York side of the line and shooting across the border kills one in New Jersey. When that is so, the blow is in fact struck in New Jersey. It is the defendant's act in this state. The passage of the ball, after it crosses the boundary, and its actual striking, is the continuous act of the defendant. In all cases the criminal act is the impinging of the weapon, whatever it may be, on the person of the party injured, and that must necessarily be where the impingement happens. And whether the sword, the ball, or any other missile, passes over a boundary in the act of striking, is a matter of no consequence. The act is where it strikes, as much where the party who strikes stands out of the state as where he stands in it. Here no act is done in this state by the defendant. He sent no missile, or letter, or message, that operated as an act within this state. The coming of the party injured into this state afterwards was his own voluntary act, and in no way the act of the defendant. If the defendant is liable here at all, it must be solely because the deceased came and died here after he was injured. Can that, in the nature of things, make the defendant guilty of murder or manslaughter here? If it can, then, for a year after an injury is inflicted, murder, as to its jurisdiction, is ambulatory at the option of the party injured, and becomes punishable, as such, wherever he may see fit to die. It may be manslaughter in its various degrees in one place, murder in its various degrees in another. Its punishment may be fine in one country, imprisonment, whipping, beheading, strangling, quartering, hanging, or torture in another, and all for no act done by the defendant in any of these jurisdictions, but only because the party injured found it convenient to travel."

In the case of *State v. Bowen*, 16 Kan., 475, Brewer, J., after reviewing the authorities bearing upon the question, says: "It seems to us, without pursuing the authori-

ties further, reasonable to hold that as the only act which the defendant does toward causing the death is in the giving the fatal blow, the place where he does that is the place where he commits the crime, and that the subsequent wanderings of the injured party, uninfluenced by the defendant, do not give an ambulatory character to the crime; at least that those movements do not, unless under express warrant of the statute, change the place of offense; and that while it may be true that the crime is not completed until death, yet that the death simply determines the character of the crime committed in giving the blow, and refers back to and qualifies that act."

In *State v. Gessert*, 21 Minn., 369, it appeared that the defendant was indicted for murder in Washington county, in that state, by feloniously stabbing and wounding one Savazyo, in said county, from which he died in the county of Pierce, in the state of Wisconsin. The indictment was demurred to on the ground that it did not charge the commission of an offense in Washington county. The court sustained the indictment. Berry, J., in passing upon the question of jurisdiction, said: "It is for his acts that defendant is responsible. They constitute his offense. The place where they are committed must be the place where his offense is committed, and, therefore, the place where he should be indicted and tried. In this instance, the acts with which defendant is charged, to-wit, the stabbing and wounding, were committed in Washington county. The death which ensued in Pierce county, though it went to characterize the acts committed in Washington county, was not an act of defendant committed in Wisconsin, but the consequence of his acts committed in Washington county."

If the crime was deemed committed in the county where the fatal wounds were given, as the authorities hold, it follows that the offense was committed when such wounds were inflicted. True, the death occurred at a subsequent date, but it relates back to the time the mortal injury

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was received. The accused committed all the acts constituting the offense on July 4. The death which ensued in Platte county on July 9 merely characterized his acts. The crime of murder consists in intentionally and unlawfully causing the death, and while it is true that the crime is not complete until death occurs, yet it is incorrect to say that the death is an element in the crime. It is merely a necessary condition to it. The elements of the crime are the acts of the perpetrator, such as the malice, intent, and the wound or blow. The crime was committed when the mortal wounds were inflicted, and he is to be tried by the laws then in force. A case precisely in point is *People v. Gill*, 6 Cal., 637. The defendant was indicted for the crime of murder. After the blow, but prior to the death of the victim, a change in the statute was made by the legislature. A conviction was had under the amended law, and upon a review of the case the supreme court held the crime to be of the date of the blow and governed by the law then in force. The chief justice, in the course of his opinion, observed: "The blow was given before, but the death ensued after, the passage of the last statute. The death must be made to relate back to the unlawful act which occasioned it, and as the party died in consequence of wounds received on a particular day, the day on which the act was committed, and not the one on which the result of the act was determined, is the day on which the murder is properly to be charged."

Complaint is made of the giving of the twelfth instruction, which reads as follows:

"12. You would in this case be warranted in convicting the defendant of murder in the first degree, and it would be your duty to do so, if you find the following facts from the evidence and beyond a reasonable doubt: First—That Catherine Debney is dead, and that she died in the county of Platte and state of Nebraska on the 9th day of July, A. D. 1893, or at some time prior to the 21st day of No-

vember, 1893, which is the date of filing the information in this case. Second—That said Catherine Debney died from the effects of wounds and injuries inflicted on her by the defendant in the manner and by the means specified in the information. Third—That the defendant inflicted said wounds and injuries upon the said Catherine Debney unlawfully and with the purpose and intent to thereby kill her; and that the said wounds and injuries were so inflicted by the defendant of his deliberate and premeditated malice. Fourth—that the said wounds and injuries were so inflicted by the defendant upon the said Catherine Debney in the county of Nance and state of Nebraska on the 4th day of July, A. D. 1893, or at some time prior to her death.”

The criticism, and the only one, suggested upon the foregoing instruction,—that it assumes the death occurred within a year and a day from the time the mortal blow was inflicted,—is without merit. It is firmly settled by our own decisions that the court has no right in its instructions to assume that any essential element of a crime has been established. It is for the jury alone to pass upon the facts and the credibility of the witnesses. (*Heldt v. State*, 20 Neb., 492; *Long v. State*, 23 Neb., 33.) But the rule stated above has not been violated or infringed by the instruction already quoted. It does not assume that the death occurred within a year and a day after the injury was received, but it was left for the jury to determine from the evidence whether or not, beyond a reasonable doubt, Mrs. Debney died after the wounds were given, and before the filing of the indictment.

Exception was taken to the eighth paragraph of the court's charge, as follows:

“8. ‘Deliberation’ means the act of deliberating or weighing and considering the reasons for and against a choice or measure. In the sense which the word is here used, an act is done deliberately, or with deliberation, when

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it is done in cool blood and not under the influence of violent passion, suddenly aroused by some real or supposed grievance. A person who does an act, not in the heat of sudden passion, but after having coolly weighed or considered the mode and means of its accomplishment, does it deliberately."

The foregoing definition of "deliberation" is substantially within the rule announced in *Craft v. State*, 3 Kan., 450. It is true this court in *Simmerman v. State*, 14 Neb., 570, criticised the definition given in the Kansas case in so far as it held it was necessary for the accused to have considered the different means for the accomplishment of the killing, and in the case at bar the instruction informed the jury that the weighing of the mode and means of the accomplishment of the act was essential to deliberation. Whether this was correct or not it is unnecessary to determine, for if it was erroneous, it was more favorable to the accused than he was entitled. Error cannot be predicated upon the giving of an instruction where it could not have prejudiced the complaining party. (*Converse v. Meyer*, 14 Neb., 190; *O'Hara v. Wells*, 14 Neb., 403; *Labaree v. Klosterman*, 33 Neb., 150; *Roggenkamp v. Hargreaves*, 39 Neb., 544; *Hurlbut v. Hall*, 39 Neb., 890; *Jolly v. State*, 43 Neb., 857.)

The twenty-fourth instruction given by the court on its own motion reads thus:

"24. While it is a general rule of law that voluntary intoxication is no excuse for the commission of crime, still, in cases of this kind, drunkenness, if proved, may be considered by the jury for the purpose of determining whether the accused at the time of the alleged killing was capable of forming a willful, deliberate and premeditated purpose to take life; and if in this case, although you believe from the evidence, beyond a reasonable doubt, that the defendant killed the deceased in manner and form as charged in the information, still, if you further believe from the evi-

dence that at the time he inflicted the fatal injuries he was so deeply intoxicated as to be incapable of forming in his mind a design, deliberately and premeditatedly, to do the killing, then such killing would only be murder in the second degree. If, however, the defendant took intoxicants to steady his nerves for the commission of the crime with which he is charged, then his intoxication would neither excuse the crime, nor reduce it from murder in the first degree to the second degree."

The criticism directed against the foregoing is twofold: First, that it imposes the burden of proving intoxication upon the defendant; and second, that the last clause of the instruction is not based upon the evidence. As to the first objection, we remark that counsel for the prisoner are correct when they say that the law does not cast the burden of proving intoxication upon the defense, but that it was sufficient if the jury from the evidence entertained a reasonable doubt upon that point. It must be borne in mind that intoxication is not a justification or an excuse for crime, but evidence of intoxication is admissible in some cases for the purpose of showing no crime has been committed, or to show the degree or grade of the offense, where the crime charged—*e. g.*, murder—consists of different degrees. In a prosecution for murder it is competent for the jury to consider evidence of intoxication as tending to show that the act was not premeditated, and that there was not such deliberation as was necessary to constitute murder in the first degree. (*Smith v. State*, 4 Neb., 278.) By at least four instructions the jury were informed that the accused should be acquitted, unless from the evidence they found that every element of the crime was established beyond a reasonable doubt. The fifteenth paragraph of the charge is in this language:

"15. By the law of the land, every person is presumed to be innocent of crime, and the defendant in this case is entitled to the benefit of this presumption as evidence in

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his favor, and in order to convict him of the crime alleged in the information, every fact necessary to constitute such crime must be established by the evidence beyond a reasonable doubt. If, after a full and fair consideration of all the evidence in the case, you entertain any reasonable doubt upon any single fact or element necessary to constitute the crime of murder in the first degree, it is your duty to give him the benefit of such doubt and acquit him of that crime; and if upon a like consideration of the evidence you entertain a reasonable doubt as to the existence of any single fact or element necessary to constitute the crime of murder in the second degree, you should give him the benefit of such doubt, and also acquit him of that charge. You should likewise acquit him of the charge of manslaughter, if upon a full and fair consideration of the evidence you entertain a reasonable doubt of the existence of any fact necessary to constitute that offense."

The foregoing was a full and clear statement of the law upon the question, and put, and properly, the burden upon the state to make out its case, at every point, beyond a reasonable doubt, although it would have been more appropriate to have used the word "degree" instead of "crime." To convict of murder in the first degree it was necessary that the act be done with deliberation and premeditation, and if the evidence left any reasonable doubt upon the minds of the jury as to whether there was any deliberation or premeditation, they knew from the charge that they could not convict him of the highest degree of murder, and they knew, too, that it was not incumbent upon the accused to prove his intoxication at the time the mortal wounds were given, since they were told that the state was required to establish every fact or element necessary to constitute the crime by the evidence beyond a reasonable doubt. This is not a case of conflicting instructions, nor does the instruction criticised undertake to impose the burden of showing intoxication upon the defendant, but the rule upon that point was cov-

ered by the general instructions upon the burden of proof. The doctrine is well settled that instructions must be construed together, and if, when so considered, the law is properly stated, it is sufficient. (*St. Louis v. State*, 8 Neb., 406; *Murphy v. State*, 15 Neb., 383; *City of Lincoln v. Smith*, 28 Neb., 762.) There was sufficient evidence before the jury upon which to base the latter portion of the twenty-fourth instruction. The evidence discloses that the defendant often drank liquors to excess; that when under the influence of intoxicants, he is cross and rough; that after he first saw his wife on the morning of the tragedy and before its occurrence, he drank liquors. The defendant testified that on the day of the shooting he took the priest to Genoa. "I was drinking outside. It was carried out in pails. I got twenty-five cents worth of beer and twenty-five cents worth of rum." The inference could properly be drawn from the testimony that defendant drank "intoxicants to steady his nerves for the commission of the crime." The instruction was applicable to the evidence.

It is also urged that the evidence is insufficient to sustain the verdict. The evidence is uncontradicted that the defendant purchased a revolver a short time before the homicide, and that he inflicted the wounds from which his wife died. The accused relies upon the defense of insanity. After a second reading of the record we are fully satisfied that the defendant at the time fully comprehended what he was doing; that his mind was clear, and that with deliberation and premeditation he committed one of the most atrocious murders that has come under our observation. The evidence bearing upon the defense of insanity was fairly submitted to the jury under proper instructions, and the verdict has settled that point against the defendant. The assignment that the verdict is unsupported by the evidence must be overruled.

Finally, it is insisted that the defendant did not have a fair and impartial trial on account of alleged misconduct

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of the audience in attendance upon the trial. It appears that at the close of the argument of the county attorney to the jury the spectators applauded by stamping of feet and clapping of hands, which applause was immediately suppressed by the presiding judge, who rebuked the persons for making the same. It was also shown that the applause was without the knowledge or connivance of those connected with the prosecution. The record fails to disclose what was said by the prosecutor in his closing address, nor does it appear from the showing made that the applause was in approval of the sentiments expressed by the county attorney. The incident complained of occurred in the presence and hearing of the trial judge, and he is better enabled than we to determine the effect, if any, the applause had upon the jury. By overruling the motion for a new trial, containing an assignment relating thereto, submitted upon the affidavits both on behalf of the accused and the state, the trial court must have been of the opinion that the demonstration was not of such a character as to influence the verdict, and no prejudice being shown, its determination will not be interfered with. (*Edney v. Baum*, 44 Neb., 294; *State v. Dusenberry*, 20 S. W. Rep. [Mo.], 461.) The accused has been accorded a fair trial, and no prejudicial error appearing in the record, the judgment is

AFFIRMED.

January 10, 1896, fixed for the execution of the sentence imposed by the trial court.

JAMES D. HAWTHORNE V. STATE OF NEBRASKA.

FILED OCTOBER 1, 1895. No. 6065.

1. **Pleading: DEMURRER.** A demurrer searches the entire record, and judgment should go against the party whose pleading was first defective in substance. *Hover v. Aultman*, 27 Neb., 251, and *Oakley v. Valley County*, 40 Neb., 900, followed.
2. **Contempt Proceedings: AFFIDAVITS: JURISDICTION.** In a proceeding to punish for an alleged contempt, not committed in the presence of the court, the affidavit upon which the proceeding is based is jurisdictional, and it must affirmatively disclose sufficient facts to show that the case is one over which the court has jurisdiction.
3. ———: **WILLFUL DISOBEDIENCE OF ORDER.** Unless the disobedience of an order of court is willful there is no contempt.
4. **Order to Pay Money on Judgment: DISOBEDIENCE: CONTEMPT.** A defendant in a civil action who has failed to comply with an order of court directing the payment by him of a certain sum of money to apply on a judgment recovered therein against him is not liable to punishment as for a contempt in refusing to comply with such order where such disobedience was not willful, but was solely on account of his being insolvent and wholly unable to pay the amount in the order required.

ERROR to the district court for Buffalo county. Tried below before HOLCOMB, J.

Marston & Nevius, for plaintiff in error.

Calkins & Pratt, contra.

NORVAL, C. J.

This was a proceeding for contempt of court instituted in the county court of Buffalo county, resulting in the conviction and sentence of the plaintiff in error. The district court, on a review of the proceedings, affirmed the judgment, and the cause was removed to this court by petition in error.

The affidavit of Warren Pratt, as the basis of the pro-

ceeding, alleges that on the 19th day of November, 1890, in an action pending in the county court of Buffalo county, wherein the Rockford Silver Plate Company was plaintiff and the said James D. Hawthorne was defendant, the said county court entered the following order: "Now on this day, in open court, the parties present by their respective attorneys, upon mature consideration of all the evidence, and being fully advised in the premises, it is ordered, considered, and adjudged by me that the said J. D. Hawthorne apply so much of the money shown by his examination as in his possession as may be necessary to the satisfaction of the judgment heretofore obtained in the county court of Buffalo county, Nebraska, by the Rockford Silver Plate Company against said J. D. Hawthorne in the sum of \$108.11, with interest at seven per cent from May 15, 1889, which said judgment was duly transcribed and is now on file in the office of the clerk of the district court of said county; and that he pay the costs of this proceeding, taxed at ——. Sheriff's fees, 85 cents; stenographer's fees, \$10; and court fees, ——" The affidavit further alleges, in effect, that the said Hawthorne prosecuted error from this order to the district court, where the same was affirmed, and the clerk of said last named court, in accordance with said judgment of affirmance, certified the decision to the county court that its order might be enforced; that a certified copy of the order of the county court and the affirmance thereof by the district court were duly served upon said Hawthorne, yet he has disregarded the order of said court by refusing to comply therewith, and still refuses to pay said money into said court as required thereby. To the affidavit or information, the plaintiff in error filed the following answer, to-wit: "That he admits all the allegations and orders set forth in the said information, but asserts his utter inability to comply with the order of the court with reference to the payment of the sum of money named in said information; that at the time

his testimony was taken, upon which the said order was made, he was wholly mistaken as to the amount of money in his hands, or belonging to him; that in truth and in fact the amount which he stated at that time to be within his control, to-wit, from \$180 to \$200, was not in money, but was in outstanding bills due to him for labor done at his bench, but which he expected would be paid as money on demand; that had such payments been made he would have been able to comply with the said order of court, but they were not made, and are still outstanding and many of them not collectible; that there has been no time since the entry of said order in which he has been able to comply therewith; that he is the head of a family, residing with the same in said county, and has no means of supporting himself and family, except by his own personal labor, and that it now takes, and has taken since said order was entered, all his earnings to support himself and family; that he disclaims all intention on his part either to disregard or disobey the order of this court, and has not complied with said order for the reason that he is wholly unable to do so. He therefore asks to be discharged from the alleged contempt of court in not complying with said order. The state filed a general demurrer to the answer, which the county court sustained, and entered an order adjudging the plaintiff in error guilty of contempt of court as charged, and that he stand committed to the jail of the county until he comply with the order of the court which he had disobeyed. The demurrer is predicated upon the single ground that the facts set up in the answer are insufficient to excuse him from complying with the order of the county court. It is a familiar rule of pleading that on demurrer the court must consider the entire record, and judgment must go against the party whose pleading was first defective in substance. (*Bennet v. Hargus*, 1 Neb., 424; *Hower v. Aultman*, 27 Neb., 251; *Oakley v. Valley County*, 40 Neb., 900.)

The first question, therefore, presented for consideration is, does the information, or affidavit, state sufficient facts to constitute a contempt over which the county court had jurisdiction? It is a firmly established doctrine that in, a proceeding to punish for an alleged contempt not committed in the presence of the court, the affidavit on which the proceeding is based is jurisdictional, and all the facts showing that the case is one over which the court has jurisdiction must be affirmatively disclosed by the affidavit. (*Gandy v. State*, 13 Neb., 445; *Ludden v. State*, 31 Neb., 437.) As was said by Wallace, J., in *Batchelder v. Moore*, 42 Cal., 412: "The power of a court to punish for an alleged contempt of its authority, though undoubted, is in its nature arbitrary, and its exercise is not to be upheld, except under the circumstances and the manner prescribed by law. It is essential to the validity of proceedings in contempt, subjecting a party to a fine and imprisonment, that they show a case in point of jurisdiction within the provisions of the law by which such proceedings are authorized, for mere presumptions and intendments are not to be indulged in their support."

It is urged in the brief filed by the state that the order requiring the plaintiff in error to pay the money into court to apply upon the judgment recovered against him was made in proceedings in aid of execution, instituted under sections 533 and 534 of the Code of Civil Procedure. If this contention is well founded, the record before us fails to disclose the fact. We may surmise, however, that the order was obtained in aid of execution, and if so regarded, how stands the case? By section 533 it is provided that when an execution sued out upon a judgment is returned unsatisfied in whole or in part, a county judge or judge of the district court of the county to which the execution was issued is authorized to issue an order requiring the judgment debtor to appear and answer concerning his property, before such judge or referee appointed by him, at a time and

place to be specified in such order. The next section reads as follows:

"Sec. 534. After the issuing of an execution against property, and upon proof by affidavit of the judgment creditor or otherwise, to the satisfaction of the district court, or a judge thereof, or a probate judge of the county in which the order may be served, that the judgment debtor has property which he unjustly refuses to apply towards the satisfaction of the judgment, such court or judge may, by order, require the judgment creditor to appear at a time and place in said county to answer concerning the same. And such proceedings may thereupon be had for the application of the property of the judgment debtor towards the satisfaction of the judgment as are prescribed in this chapter."

It will be observed that the affidavit of Mr. Pratt, which is the foundation of the contempt proceeding, does not allege, nor does the record before us disclose, that any execution was ever issued upon the judgment in the case of the Rockford Silver Plate Company against James D. Hawthorne, or if one was issued that it was ever returned unsatisfied. Furthermore, the affidavit does not aver that it is in the power of the plaintiff in error to comply with the order of the court, nor does it allege that proof by affidavit or otherwise was made to the county judge that Mr. Hawthorne "has property which he unjustly refuses to apply toward the satisfaction of the judgment rendered against him." It therefore follows that the affidavit in this case is fatally defective, and the order of the county judge, to which the plaintiff in error refuses to yield obedience, is void, because such judge had no jurisdiction to make the same. Again, the answer of the plaintiff in error shows that his disobedience of the order was not willful or contumacious, but was occasioned by his not having the property or money wherewith to satisfy the judgment, and for this reason he was entitled to be discharged. A rule for

contempt for failure to pay a sum of money into court will be discharged when it is made clearly to appear that at the time the proceedings in contempt were commenced and ever since it was not within his power to make the payment, unless it is disclosed that the party has disabled himself from paying. (*Adams v. Haskell*, 6 Cal., 316; *Cochran v. Ingersoll*, 13 Hun [N. Y.], 368; *Oekershausen v. Oekershausen*, 59 Hun [N. Y.], 200; *Pain v. Pain*, 80 N. Car., 322; *Martin v. Burgwyn*, 13 S. E. Rep. [Ga.], 958; *Hogue v. Hayes*, 53 Ia., 377; *O'Callaghan v. O'Callaghan*, 69 Ill., 552.) The Iowa case cited above is on all fours with the one at bar. In a proceeding in aid of execution Hogue, the judgment debtor, was ordered by Hayes, as judge of the district court, to pay over to the sheriff \$100 and deposit with the clerk of the court certain notes to apply on a judgment. Having failed to comply with this order, on application of the judgment creditor an attachment was issued against Hogue to show cause why he should not be punished for contempt of court. He filed an answer denying all contempt of court, and showing that prior to the making of the order to pay the money he had paid out the same, and that the notes had been negotiated and had not been in his control and that it was impossible for him to comply with the order of court by producing and depositing them. A demurrer was interposed to the answer, which was sustained, and Hogue was adjudged guilty of contempt of court. Upon a review of the proceedings, Adams, C. J., in delivering the opinion of the court, uses the following apposite language: "The answer shows that the money was paid out before the order was made, and the notes are not within the plaintiff's control. Such being the fact, it was of course impossible to obey the order, and it follows that in failing to obey it there was no actual contempt. The defendant insists, however, that it is immaterial whether the thing ordered to be done was impossible or not, or whether there was any actual contempt or not, that if

the order was impossible to be performed it should have been superseded by an appeal, and as that was not done the plaintiff should be imprisoned as for a contempt. The argument is, that plaintiff cannot be heard to set up the impossibility of obeying the order without impeaching, incidentally at least, the correctness of the order, and that that cannot be done in this way. The argument has the merit of being plausible, but we are unable to conclude it is sound. It would result that a person is liable to be imprisoned for life for failing to do an impossible thing, and merely upon the ground that he is estopped from showing that it is impossible. In our opinion the conclusiveness of the correctness of the order does not reach so far as to preclude the plaintiff, upon a proceeding for an alleged contempt, from showing that there was no contempt in fact. The maintenance of the dignity of the court does not require the punishment of a person as for a contempt which had no existence in fact, nor are the rights of the creditor subserved in such case. We think that the judgment of the district court cannot be sustained, and that the order of commitment should be set aside." The cases cited above are equally in point with the one from which the foregoing excerpt was taken. Construing the answer of Hawthorne to the rule to show cause in the light of these decisions, there is no room for doubt that the order committing the plaintiff in error to jail should be vacated and set aside, since it is manifest that he is entirely unable to comply with the order of the county court for the payment of money. Courts will not require of a party an impossibility. There has been no willful disobedience of a lawful order, hence no contempt of court has been committed. The judgment of the district court is reversed and the order of commitment set aside.

REVERSED.

GREEN S. GRAVELY V. STATE OF NEBRASKA.

FILED OCTOBER 1, 1895. No. 7486.

1. **Criminal Law: JURORS: ORDER OF MAKING PEREMPTORY CHALLENGES.** Inasmuch as the statute does not prescribe the order in which peremptory challenges to jurors shall be taken by the accused and state respectively, the order in which the right to challenge shall be exercised is left to the sound discretion of the trial court, and its decision upon that point will not be disturbed, unless it clearly appears that there has been an abuse of discretion prejudicial to the party complaining. Rule applied.
2. ———: **INSTRUCTIONS: EXCEPTIONS: REVIEW.** Instructions, given or refused, will not be reviewed where no exception is taken in the trial.
3. **Murder: MOTIVES OF ACCUSED: EVIDENCE.** In a trial for murder it is competent for the state to adduce evidence against the defendant tending to show a motive for the homicide.
4. **Homicide: EVIDENCE.** *Held*, That the evidence sustains a verdict for manslaughter.

ERROR to the district court for Lancaster county. Tried below before STRODE, J.

Cobb & Harvey and *W. B. Price*, for plaintiff in error.

A. S. Churchill, Attorney General, and *George A. Day*, Deputy Attorney General, for the state.

NORVAL, C. J.

The plaintiff in error was charged with murder in the first degree in the district court of Lancaster county. He was convicted of the crime of murder in the second degree, which judgment was reversed by this court at the January, 1894, term, the opinion in the case being reported in 38 Neb., 871. On the second trial the plaintiff in error was found guilty of manslaughter, and sentenced to a term of nine years in the penitentiary. This last judgment he seeks to reverse by this proceeding. Four grounds are re-

lied upon by the counsel for the prisoner for a new trial, which we will consider in the order presented in the briefs.

The first objection is predicated upon the ruling of the trial court to the effect that by the accused waiving his eleventh peremptory challenge he thereby waived his remaining challenges. The record before us discloses that the court below, as well as the county attorney and the counsel for the defendant, at the commencement of the selection of the jury in this case entertained the erroneous opinion that the statute gave to the state eight peremptory challenges instead of six. The challenging of the jurors was commenced upon the theory that the defense had sixteen peremptory challenges and the state eight, and under this misapprehension as to the law the state was required to, and did, exercise one peremptory challenge, followed by two challenges for the defense, and then the state one and the defense two. In this mode five challenges were exhausted by the state, and by the accused ten, when it was discovered that the statute only allowed the state six peremptory challenges. Thereupon the trial court directed the defendant to avail himself of the six remaining challenges, if he so desired, giving to the state the last challenge. The defendant then waived his eleventh challenge, and the court held, and so informed counsel in advance, that by so doing he waived his other five challenges. It is for this decision and ruling that a reversal of the judgment is asked.

By section 467 of the Criminal Code, on the trial of a person for a crime punishable with death, the accused is authorized to peremptorily challenge but sixteen jurors, and the prosecuting attorney six. While the statute prescribes the number of challenges, it contains no provision as to the order in which the right shall be exercised by the state or by the prisoner. This being true, it is clear that the course of proceeding in regard to peremptory challenges is left to the sound discretion of the trial court, and its deci-

sion in that regard is no cause for disturbing the verdict, unless it is clearly made to appear that there has been an abuse of discretion. Upon this point the authorities are harmonious, and fully sustain our conclusion. (1 Thompson, Trials, sec. 94; *Commonwealth v. Piper*, 120 Mass., 185; *Turpin v. State*, 2 Crim. Law Mag. [Md.], 532; *State v. Pike*, 49 N. H., 399; *State v. Pierce*, 8 Ia., 231; *Schufflin v. State*, 20 O. St., 233.) While the statute fails to prescribe the order in which challenges to jurors shall be made, manifestly the legislature never contemplated that the state should exhaust all its peremptory challenges before the defense is called upon to challenge, or that the accused should first take all his peremptory challenges. The more fair and equitable rule is the one adopted in this case. The waiver by the plaintiff in error of his eleventh challenge was a waiver of his remaining five challenges, and counts against him as though he had actually made them.

The second ground argued for a reversal is based upon the refusal of the trial court to give the defendant's sixteenth instruction, which reads as follows:

"16. The character of the defendant is not an issue in this case, but you are instructed that the law presumes that he has a good character until he himself puts it in issue, and then, and only then, can the state offer evidence of his bad character; therefore you are instructed that you are to presume that the defendant has a good character, as he has not put it in issue."

We cannot review the foregoing request to charge, for more than one reason. In the first place, no exception in the trial court was taken to the refusal to give this instruction. By a long line of decisions it has been held that such exception is indispensable to review the action of the trial court upon the giving or refusing of instructions. (*Heldt v. State*, 20 Neb., 499; *Carleton v. State*, 43 Neb., 373; *Warrick v. Rounds*, 17 Neb., 415; *Nyce v. Shaffer*, 20

Neb., 509; *Levi v. Fred*, 38 Neb., 564; *City of Chadron v. Glover*, 43 Neb., 732; *Bloedel v. Zimmerman*, 41 Neb., 695; *Barr v. City of Omaha*, 42 Neb., 341.) Again, the assignment of error as to the refusing of this instruction is insufficient. The accused requested sixteen instructions, numbered from 1 to 16 inclusive, all of which the court below declined to give to the jury, and such refusal is assigned as error, the assignment in the petition in error, as well as in a motion for a new trial, being that the court erred in not giving the entire sixteen instructions asked. That such an assignment is bad, unless each of the instructions in the group was proper and should have been given, is no longer an open question in this court. (*Hiatt v. Kinkaid*, 40 Neb., 178; *McDonald v. Bowman*, 40 Neb., 269; *Jenkins v. Mitchell*, 40 Neb., 664; *Murphy v. Gould*, 40 Neb., 728; *Armann v. Bucl*, 40 Neb., 803; *Berneker v. State*, 40 Neb., 810; *Hewitt v. Commercial Banking Co.*, 40 Neb., 820; *Havens v. Grand Island Light & Fuel Co.*, 41 Neb., 157; *Rea v. Bishop*, 41 Neb., 202; *City of Chadron v. Glover*, 43 Neb., 732; *Omaha Fair & Exposition Association v. Missouri P. R. Co.*, 42 Neb., 110; *Mullen v. Morris*, 43 Neb., 611; *Funk v. Latta*, 43 Neb., 741.) An examination of the several instructions requested by the prisoner discloses that the most of them were fully covered by the charge of the court, and, therefore, it was not reversible error to repeat them. It follows that the assignment relating to the refusal of the instructions must be overruled. The result would be the same, even though we should brush aside the technical objections already mentioned to the consideration of instruction copied above. Conceding that said request to charge was faultless as an abstract proposition of law, yet it was properly refused, for the reason it was not applicable to the case made by the proofs. True, no evidence was given or offered as to whether the general reputation of the accused for being a peaceable and quiet man was good or bad, nevertheless, as is suggested by the attorney general, the witnesses

for the state, in detailing the circumstances of the crime, and of the causes which led up to its commission, incidentally disclosed the character of the prisoner to be unenviable, and that he had boasted of "having served a term in the penitentiary for killing a nigger." From a careful examination of the record we are convinced that the court below did not err in refusing the request to charge.

Objection is made to the testimony of Clara Thomas, the wife of the deceased, as to what transpired at her home on the afternoon of the day preceding the killing. She testified that the accused came to her house with Will Jamison and Bud Mills at the time stated and Gravely said "he wanted to shoot dice, and then Will Jamison lost a twenty-five cent piece and threw the dice away, and I told him to buy some dice. I told Mr. Gravely to buy some dice, and he said he had enough money out of those niggers, and then I ordered him out of the house, and then he pulled a gun and said he just got out of the pen for killing one nigger, and I'll just kill another. I just as soon go back for you." This conversation and threat were communicated by Mrs. Thomas to her husband the evening after the occurrence thereof. The theory of the defendant below was, and is, that the killing was in self-defense. From the evidence adduced on the trial it is fully established, without contradiction, that the quarrel with Mrs. Thomas was the sole foundation of the difficulty between the plaintiff in error and Mr. Thomas, which terminated in the taking of the life of the latter. Evidence of the quarrel had with the wife of the deceased was admissible as tending to show a motive for the homicide and to disprove the claim of self-defense. The rule is that "when it is shown that a crime has been committed and the circumstances point to the accused as the guilty agent, facts tending to show a motive, although remote, are admissible in evidence." (*Dill v. State*, 1 Tex. Ct. App., 278; *Baalum v. State*, 17 Ala., 451; *Coward v. State*, 6 Tex.

Ct. App., 59; *People v. Wallers*, 98 Cal., 138.) The testimony objected to, standing alone, would be entitled to but slight weight, but we cannot say, when considered in connection with the other evidence in the case and the circumstances surrounding the killing, that the court erred in permitting it to go to the jury. The general rule undoubtedly is as stated in *Carr v. State*, 23 Neb., 749, that threats made by the accused prior to the homicide, to kill or injure some other person than the deceased, are inadmissible against him, but an exception to the rule is that threats against, or quarrels with, members of the family of the deceased may be received as tending to establish a motive, where connection is shown between such threats or quarrels and the offense charged.

The remaining point argued is that the evidence is insufficient to warrant a conviction. The killing of Thomas by the plaintiff in error is undisputed, but the latter claims that the deceased was the aggressor and that his life was taken by Gravely in defense of his person. We have with great care perused and given due consideration to the evidence contained in the bill of exceptions, and find that the testimony was ample to sustain the verdict, if the witnesses for the state were credible. The question of the credibility of the witnesses was properly submitted to the jury by the instructions, and, so far as we are able to determine from the record, the plaintiff in error has had a fair and impartial trial and has been convicted upon sufficient legal testimony. There being no error in the record the judgment is affirmed.

JUDGMENT AFFIRMED.

PAXTON & HERSHEY IRRIGATING CANAL & LAND COMPANY, APPELLANT, v. FARMERS & MERCHANTS IRRIGATION & LAND COMPANY, APPELLEE.

FILED OCTOBER 1, 1895. No. 7724.

1. **Constitutional Law: TITLES OF BILLS.** The provision of section 11, article 3, of the constitution, viz., "No bill shall contain more than one subject, and the same shall be clearly expressed in its title," is intended to prevent surreptitious legislation and not to prohibit comprehensive titles.
2. **Irrigation: EMINENT DOMAIN: STATUTES: CONSTITUTIONAL LAW.** The term "irrigation," as employed in the title of the act of March 27, 1889, viz., "An act to provide for water rights and irrigation, and to regulate the right to the use of water for agricultural and manufacturing purposes," etc., is used in its popular sense and implies the means of conducting water to the land to be supplied. The provision therein for the acquiring by irrigating companies of the right of way for canals and ditches accordingly held to be within said title and not to conflict with section 11, article 3, of the constitution.
3. **Eminent Domain: CONSTITUTIONAL LAW: LEGISLATIVE AUTHORITY: COURTS.** To the legislature, and not to the courts, has been committed the power to determine when the exigencies of the public demand the taking of private property, the limit of judicial interference being the duty to declare void acts clearly in conflict with the constitution.
4. ———: ———: ———. There is no arbitrary standard by which to determine whether the purpose to which property is appropriated possesses the element of public utility. Public use, in a constitutional sense, may be confined to the inhabitants of a restricted locality or neighborhood, but the use must be common, and not to a particular individual.
5. ———: **RAYNER IRRIGATION LAW.** The use of water for the purpose of irrigating contemplated by the act of March 27, 1889, known as the "Rayner Irrigation Law," is a public use within meaning of the constitution.
6. **Irrigation: RIGHT OF WAY: CONDEMNATION.** Section 8 of article 2, of the "Rayner Irrigation Law" confers upon irrigating companies organized under the laws of this state power to

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acquire the right of way for necessary canals, reservoirs, etc., by condemnation.

7. ———: CONSTRUCTION OF ACT. The word "if" in the first line of the section last above mentioned is evidently an interpolation, having no relation to the body of the section, without sensible meaning, and should accordingly be disregarded in giving effect to the provisions of the act.
8. ———: ———: LANDS OF CORPORATIONS. The provision of section 3, article 1, of the irrigation law of 1889, viz., "No tract of land shall be crossed by more than one ditch," etc., held to include lands owned by corporations as well as natural persons.
9. Statutes: PROVISIO: CONSTRUCTION. A proviso which would operate to limit the application of an enacting clause, general in its terms, will be strictly construed, and includes no case not within the letter of the exception.
10. Irrigating Companies: CONNECTION OF DITCHES. The irrigation law of 1889 does not confer upon one irrigating company any right to connect with the ditches of another or take water therefrom without the consent of the proprietor.
11. ———: CONSTRUCTION OF STATUTE: DITCHES. What is meant by the exception contained in section 3, article 1, of the act above mentioned is that no tract of land shall, without the consent of the owner, be burdened with two or more ditches for the watering of the same territory. The question is not whether the first ditch may be so enlarged or extended as to answer the purpose for which the second is designed, but whether it may as constructed be made to supply the lands within reach of both.

APPEAL from the district court of Lincoln county.
 Heard below before SINCLAIR, J.

The opinion contains a statement of the case.

Frank T. Ransom and *T. Fulton Gantt*, for appellant:

The irrigation law of 1889 is unconstitutional in so far as it attempts to confer authority to condemn lands for right of way for canals. The act contains more than one subject. Article 2 treats upon a subject foreign to that mentioned in the title of the act, and is, therefore, in contravention of section 11, article 3, of the state constitution

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which provides: "No bill shall contain more than one subject, and the same shall be clearly expressed in its title." (*City of Tecumseh v. Phillips*, 5 Neb., 305; *Messenger v. State*, 25 Neb., 674; *State v. Lancaster County*, 6 Neb., 474; *Holmberg v. Hauck*, 16 Neb., 337; *Touzalin v. City of Omaha*, 25 Neb., 817.)

The act is unconstitutional because it attempts to authorize the taking of private property for private use. (*State Bill of Rights*, sec. 21; *Welton v. Dickson*, 38 Neb., 767; *Jenal v. Green Island Draining Co.*, 12 Neb., 163; *William v. Osburn*, 4 Ore., 318; *Lorenz v. Jacob*, 63 Cal., 73; *Randolph*, *Eminent Domain*, 37.)

Statutes permitting drainage canals to be placed on land for the benefit of an individual proprietor have uniformly been held to be invalid as being for private purposes, unless there was some provision in the state constitution permitting such statutes. (*Fleming v. Hull*, 73 Ia., 598; *McQuillen v. Hatton*, 42 O.St., 202; *Reeves v. Wood County*, 8 O. St., 333.)

The canals already constructed may be made to answer the purpose for which the defendant's proposed canal is desired and intended, and defendant should be enjoined from crossing the land of plaintiff with an irrigating ditch. (*Compiled Statutes*, sec. 3, ch. 93a; *San Luis Land, Canal & Improvement Co. v. Kenilworth Canal Co.*, 32 Pac. Rep. [Col.], 860.)

Thomas C. Patterson and Grimes & Wilcox, contra:

So far as the act of 1889 declares irrigation to be a public use, and provides for the condemnation of land for right of way for canals that are projected and built for the purpose of supplying water to the public for irrigation, it clearly comes within the constitutional power of the legislature to legislate for the public welfare. (*In re Bonds, Madera Irrigation District*, 28 Pac. Rep. [Cal.], 272; *Cumming v. Peters*, 56 Cal., 593; *Lux v. Haggin*, 69 Cal., 255;

Lindsay Irrigation Co. v. Mehrtens, 97 Cal., 677; *Talbot v. Hudson*, 16 Gray [Mass.], 425; *Oury v. Goodwin*, 26 Pac. Rep. [Ariz.], 376; *Barbier v. Connolly*, 113 U. S., 31; *Head v. Amoskeag Mfg. Co.*, 113 U. S., 16; *Stockton & V. R. Co. v. City of Stockton*, 41 Cal., 147; *Bankhead v. Brown*, 25 Ia., 540; *Pocantico Water-Works Co. v. Bird*, 29 N. E. Rep. [N. Y.], 246; *Omsted v. Proprietors of the Morris Aqueduct*, 46 N. J. Law, 495; *St. Helena Water Co. v. Forbes*, 62 Cal., 182; *Matter of New Rochelle Water Co.*, 46 Hun [N. Y.], 525; *Stamford Water Co. v. Stanley*, 39 Hun [N. Y.], 424; 6 Am. & Eng. Ency. Law, 524; Cooley, Constitutional Limitations [4th ed.], 672.)

The following cases were also cited to sustain the decision of the lower court: *Downing v. Moore*, 20 Pac. Rep. [Col.], 766; *Thomas v. Guiraud*, 6 Col., 530; *Dick v. Caldwell*, 14 Nev., 167; *Simpson v. Williams*, 18 Nev., 432; *Farmers' Independent Ditch Co. v. Agricultural Ditch Co.*, 32 Pac. Rep. [Col.], 724; *Farmers' High Line Canal & Reservoir Co. v. Southworth*, 21 Pac. Rep. [Col.], 1028; *Clifford v. Larrien*, 11 Pac. Rep. [Ariz.], 397; *Wyatt v. Larimer & Weld Irrigation Co.*, 33 Pac. Rep. [Col.], 144; *Cole v. Logan*, 33 Pac. [Ore.], 568; *Knoblauch v. City of Minneapolis*, 57 N. W. Rep. [Minn.], 929; *Barrett v. Kemp*, 59 N. W. Rep. [Ia.], 77; *Cherry v. Matthews*, 36 Pac. Rep. [Ore.], 529; *City of Santa Ana v. Harlin*, 34 Pac. Rep. [Cal.], 225; *Waterloo Water Co. v. Hoxie*, 56 N. W. Rep. [Ia.], 499; *Western Maryland R. Co. v. Patterson*, 37 Md., 125; *Philadelphia, W. & B. R. Co. v. Williams*, 54 Pa. St., 103; *Eidemiller Ice Co. v. Guthrie*, 42 Neb., 238; *Tigard v. Moffitt*, 13 Neb., 565; *Gause v. Perkins*, 3 Jones Eq. [N. Car.], 177.

Post, J.

This is an appeal from a decree of the district court for Lincoln county dismissing the action of the plaintiff company, whereby it seeks to prevent the appropriation by the

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defendant of a right of way through its lands for an irrigating canal. In the petition it is, in substance, alleged that the plaintiff company is the owner of 10,000 acres of land, bounded by the North Platte river, in Lincoln county, and also of an irrigating canal known as the "Paxton & Hershey ditch," situated on its said lands and on the lands of other adjoining proprietors; that upon its said land, and nearly parallel with the ditch above mentioned, is an irrigating canal known as the "North Platte Irrigating & Land Company's ditch," and herein referred to as the "North Platte ditch," and that in the vicinity of the plaintiff's lands sought to be watered by the defendant's proposed canal is an irrigating canal known as the "Cody & Dillon ditch." The plaintiff, it is alleged, has constructed a large number of laterals from its said canal, which it is proposed by the defendant company to cross, thus necessitating the construction and maintaining of many bridges, flumes, and conduits, and otherwise needlessly harassing it in the use and enjoyment of its said property. The defendant company, which is organized for the purpose of building and maintaining ditches, canals, aqueducts, and reservoirs for the storage and conveyance of water and of selling water to consumers for irrigating, power, and other useful purposes, prior to the commencement of this action, entered upon the plaintiff's said land, and located and staked out a ditch thereon four and one-half miles in length, and is taking steps to condemn a right of way therefor, but that the three ditches above described afford ample facilities for the irrigation of all of the land sought to be supplied by the defendant company, and that water sufficient to supply the defendant's wants can be furnished from the ditches already constructed, should connection be made therewith, at less expense than by the construction and maintaining of the proposed ditch through the plaintiff's land to the source of supply, the North Platte river. The answer, so far as it is deemed necessary to notice it, consists of an allegation

that the defendant is engaged in the construction of an irrigating canal some twenty miles in length for the purpose of supplying with water from the North Platte river certain territory not within the reach of either of the canals already constructed, a denial that the plaintiff's canal is capable of supplying the lands which the defendant proposes to water, and an allegation that the water supplied by said canal is barely sufficient for the irrigation of the plaintiff's own land. Accompanying the pleadings is a map showing the location of the proposed ditch, as well as those already completed, and which is essential to a perfect understanding of the question at issue. (See page 890.)

The district court, upon entering the decree complained of, submitted the following findings of fact and conclusions of law:

"1. The plaintiff is a corporation organized and existing under and by virtue of the laws of this state for the following purposes: To construct, own, operate, and maintain a canal or canals, ditch or ditches, for irrigation purposes, to purchase, acquire, own, sell, and convey all real estate that may be necessary for such purposes, and to acquire, own, sell, and convey real estate in connection with carrying on an irrigating business, and to acquire, own, sell, and convey real estate for other purposes deemed advisable or advantageous to the corporation and its interest, and to cultivate and improve such lands as shall be owned by the corporation; to furnish, sell or rent water for irrigation of lands which shall be owned by said corporation and within its area and other lands within reach of any canal or canals which shall be owned, operated, or controlled by the corporation owning live stock and raising the same in connection with the land held or controlled by this corporation.

"2. The plaintiff is the owner of about 7,000 acres of land located on and adjacent to the banks of the North Platte river, in Lincoln county, Nebraska, as alleged in its

petition, and is the owner of an irrigating canal running across its said lands, and the lands of others, for a distance of about ten miles, which canal is finished and constructed for the purposes of irrigating the land under the said ditch, and for the purposes set forth in the articles of incorporation of the plaintiff.

"3. The defendant is a corporation organized under the laws of this state for the following purposes, among others: The building and maintaining of canals, ditches, and aqueducts and reservoirs for the storage and conveyance of water, and the selling of such water to consumers for irrigation, agricultural, power, and other useful purposes.

"4. The plaintiff is the owner of the tract of land proposed to be crossed by the proposed canal of the defendant and which lies under the plaintiff's ditch and which is proposed to be crossed by defendant's ditch for a distance of four miles and a half.

"5. All of the land of the plaintiff across which the defendant proposes to construct its canal, for a distance of four and a half miles, can be irrigated from and by plaintiff's canal, and it is not proposed by the defendant to water or irrigate any of plaintiff's said land within said four miles and a half.

"6. That the defendant corporation is the owner of no land to be watered by its proposed ditch, but that the object of said corporation is for the purpose of constructing and operating a canal or ditch for irrigation purposes for the lands lying contiguous under said ditch for other parties to hire.

"7. That at the points where it is alleged that the defendant's ditch crosses the lands of the plaintiff it is necessary for the defendant to run said ditch across said lands in order to get its water out of the North Platte river, with necessary fall in accordance with the surveyed route of its ditch; that in the territory covered by the ditch of the plaintiff's it is not the object nor the purpose of the

defendant's ditch to irrigate said land, but lands lying below and beyond the territory of the plaintiff's ditch.

"8. There are about 40,000 acres of land between the North and South Platte rivers, and in this territory the evidence shows that the North Platte Ditch Company has a ditch about twenty miles long running through the middle portion of the peninsula formed by the two rivers. The plaintiff's ditch is also constructed in this peninsula and is in length about ten miles. The Cody & Dillon ditch is also in this peninsula and is about six miles in length. A great amount of evidence has been taken to show the capacity of these several ditches for watering the land in the peninsula, including the land proposed to be watered by the defendant's ditch. The location of these several ditches in the peninsula, their dimensions and their capacity, appears from the evidence and the maps introduced in the evidence, but the court does not find nor pass upon the evidence relating to the question as to whether or not this water could be supplied by the defendant's constructing their ditch up and to the plaintiff's ditch and receiving water therefrom, for the reason there is no provision in the act contemplating it is obligatory upon the defendant to so do.

"9. The court further finds that the defendant's proposed ditch will cross the lands of the plaintiff through which plaintiff's ditch has already been built which lands are also irrigated from plaintiff's ditch.

"10. The court further finds that the plaintiff has not given its written consent to cross the lands owned by it proposed to be crossed by the defendant with its said proposed canal and objects to its appropriation of its lands for the purpose of constructing the defendant's said ditch over the same.

"CONCLUSIONS OF LAW.

"First—That section 2034 [sec. 3, art. 1, irrigation law of 1889] is not applicable to the facts in this case, for the reason that the defendant's contemplated ditch is not being

constructed for the purpose of irrigating the lands crossed by the plaintiff's ditch, nor the lands lying under the plaintiff's ditch, but for the purpose of irrigating lands beyond and below the plaintiff's ditch.

"Second—That the defendant is entitled to cross the lands of the plaintiff for the purpose of constructing its said ditch on complying with the necessary requirements of law for said purpose."

It will be observed from the foregoing statement and opinion that the defendant's claim to a right of way for its canal through the plaintiff's land is founded upon the provisions of the act of March 27, 1889, known as the "Rayner Irrigation Law," entitled "An act to provide for water rights and irrigation, and to regulate the right to the use of water for agricultural and manufacturing purposes, and to repeal sections one hundred and fifty-eight (158) and one hundred and fifty-nine (159) of chapter 16 of the Compiled Statutes of 1887, entitled 'Corporations.'"

The first contention on this appeal is that the provision for the acquiring by corporations of the right of way for irrigating ditches in the exercise of the power of eminent domain is foreign to the title of the act mentioned, and accordingly violative of section 11, article 3, of the constitution, viz., "No bill shall contain more than one subject, and the same shall be clearly expressed in its title." The object of the foregoing provision has been declared not to prohibit comprehensive titles, but to prevent surreptitious legislation, by advising representatives of the nature and purpose of the measures they are called upon to support or oppose. (*Kansas City & O. R. Co. v. Frey*, 30 Neb., 790; *In re White*, 33 Neb., 813; *Trumble v. Trumble*, 37 Neb., 340; *City of South Omaha v. Taxpayers' League*, 42 Neb., 671.) It is said in *White's* case, *supra*, that the legislature has the right to choose the title to any act passed by it, and although that chosen may not be the most appropriate the act will not be held void unless clearly in conflict

with the constitution. When tested by that rule we cannot doubt that the provision assailed is germane to the title of the act, and within the evident purpose thereof, viz., the utilizing of the public waters in the further development of the agricultural resources of the state. The word "irrigation," as employed in the title of the act under consideration, is apparently used in its popular sense, and denotes the application of water to land for the production of crops. (*Platte Water Co. v. Northern Colorado Irrigation Co.*, 12 Col., 525.) The use of water for the purpose of irrigation clearly implies the means of conducting it to the land to which it is applied, and any plan such as contemplated by the act of 1889 which omits provision for the enforced access by the public to the source of supply is necessarily partial and ineffective.

2. The act, in so far as it makes provision for the acquiring of the right of way for irrigating canals by condemnation, is also vigorously assailed on the ground that it contemplates the taking of property for private use only, and therefore in conflict with section 21 of the Bill of Rights, viz., "The property of no person shall be taken or damaged for public use without just compensation therefor." This provision has been held to prohibit, by implication, the taking of private property for private use of any character whatever without the consent of the owner. (*Jenal v. Green Island Draining Co.*, 12 Neb., 163; *Welton v. Dickson*, 38 Neb., 767.) In the last mentioned case it was held, following *Coster v. Tide Water Co.*, 18 N. J. Eq., 54, that the want of power in the legislature to transfer to one person the property of another does not necessarily depend upon constitutional restrictions, but upon the fact that such authority is in no sense an incident to the powers conferred upon the law-making branch of the government. We are thus for the first time confronted with the question whether the use contemplated by the statute is a public one in a constitutional sense, or whether it is a mere

private use and accordingly within the prohibition mentioned. In this connection it should be observed that to the legislature, and not to the courts, has been committed the power to determine when the exigencies of the public demand the taking of property for public uses, the limit of judicial interference being the duty to declare void acts clearly violative of the fundamental law of the state. There is no arbitrary standard by which to determine whether the purpose to which property is appropriated possesses the elements of public utility. It has been said by an eminent jurist: "The public use required, need not be the use or benefit of the whole public or state, or any large portion of it. It may be for the inhabitants of a small or restricted locality, but the use and benefit must be in common, and not to particular individuals or estates." (See Chancellor Zabriskie in *Coster v. Tide Water Co.*, *supra*.) Again, it has been said that "the use is public when it promotes the interests of a considerable portion of the community, although it may not benefit the community at large." (Kinney, *Irrigation*, sec. 94. See, also, Black's *Pomeroy*, *Water Rights*, 174; *Lux v. Haggin*, 69 Cal., 304; *Oury v. Goodwin*, 26 Pac. Rep. [Ariz.], 376; *Umatilla Irrigation Co. v. Barnhart*, 30 Pac. Rep. [Ore.], 37; *Foster v. Park Commissioners*, 133 Mass., 321; *Hagar v. Reclamation District*, 111 U. S., 701; *Wurts v. Hoagland*, 114 U. S., 606; *Pocantico Water-Works Co. v. Bird*, 130 N. Y., 249.) In the last mentioned case we observe the following pertinent language: "The term 'public use,' as used in connection with the right of eminent domain, is not easily defined. * * * It is doubtless true that in order to make the use public a duty must devolve upon the persons or corporation holding the property to furnish the public with the use intended. The term implies 'the use of many,' or 'by the public,' but it may be limited to the inhabitants of a small or restricted locality, but the use must be in common and not for a particular individual." It has been said that if by any

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reasonable construction a designated use may be held to be public in a constitutional sense, the will of the legislature should prevail over any mere doubt of the court (*Blankhead v. Brown*, 25 Ia., 540; *In re Bonds, Madera Irrigation District*, 92 Cal., 309; *Coster v. Tide Water Co.*, *supra*), which, however, is but the application of a fundamental principle of our system, viz., the independence of each department of the government within its own domain. It should be remembered, too, that the essential features of the "Rayner Irrigation Law" appear in the legislation of the several Pacific states, notably of California, whose constitutional provisions on the subject do not differ substantially from ours, and where it had, long previous to its adoption by us, received a definite construction adverse to the contention of the plaintiff herein. (See *Lux v. Haggin*, *supra*.) The legislature must, therefore, have intended to adopt not the statute alone, but the construction placed upon it in the state of California. Such is the well established rule. (*Bohanan v. State*, 18 Neb., 57.) But any examination of this subject is necessarily incomplete which omits mention of the recent case of *Bradley v. Fallbrook Irrigation District*, 68 Fed. Rep., 948, holding that assessments under the provisions of the district irrigation law of that state contemplate the taking of property for mere private purposes and accordingly within the prohibition of the United States constitution. It is unnecessary, however, at this time to examine the reasoning upon which that case rests, since it is therein declared inapplicable to the ordinary use of water for irrigating purposes in the arid region of California, and therefore in harmony with *Lux v. Haggin* and later cases in which the same doctrine is asserted by that court. The varying conditions of society are constantly presenting new subjects of public utility, which is but another name for public necessity, hence the force of Chancellor Vroom's remark in *Scudder v. Trenton Delaware Falls Co.*, 1 N. J. Eq., 694, that what shall be deemed a

public use depends somewhat on the situation and wants of the community for the time being. Nor were the conditions surrounding the people of the Pacific states, when the foundation was laid for the body of their laws upon the subject, materially different from those which to-day confront the western half of our own state. We behold what was but yesterday the public domain, occupied to the western limit of the rain belt, so called, and settlers eagerly seeking for homes in the semi-arid region beyond. We behold thousands of acres of fertile land in the valleys of the Platte, the Loups, the Elkhorn, and the Republican rivers, practically worthless under existing conditions for the purpose of agriculture, but which by application of the waters of those streams may be made most productive, thus not only supporting the rapidly increasing population of that region, but adding largely to the wealth and material prosperity of the state. That an undertaking so important can be successfully prosecuted alone through the agency of the state none can doubt. The reclamation of a region so vast, equal in extent to more than one state of the Union, is surely a legitimate function of government. And the exercise of the reserve power of the state in the promotion of an enterprise so beneficial is not even in a technical sense violative of the restrictive features of the constitution.

3. It is next argued that authority to appropriate land for right of way purposes is by the law of 1889 conferred upon property owners only, and it being admitted that the defendant company is not the owner of any of the lands lying under its ditch, is not within the provisions of the act. The purpose of sections 1, 2, 3, and 4 of article 2, to which we are referred in support of that contention, was apparently, to confer upon individuals and corporations the right of way in certain cases through the premises of adjoining proprietors. It is, however, unnecessary to examine the provisions mentioned, since the plaintiff's argument is based upon an apparent misconception of the defendant's claim,

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which is under the provisions of sections 8 and 9 of article 2, viz.:

"Sec. 8. If any corporation organized under the laws of this state for the purpose of constructing and operating canals for irrigating or water power purposes, or both, may acquire a right of way over or upon any land for the necessary construction of such canal, including dams, reservoirs, and all necessary adjuncts to said canals, in the same manner as provided for persons and companies in this act, and such persons, canal companies, and corporations shall have the same power to occupy state lands with their said canals as is given to railroad corporations by section 105, chapter 16, of the Compiled Statutes of 1887; and such corporations shall also have power to borrow money and to mortgage all their property and franchises in the same manner and for the same purposes as railroad companies. * * *

"Sec. 9. Canals constructed for irrigating or water power purposes, or both, are hereby declared to be works of internal improvement, and all laws applicable to works of internal improvement are hereby declared to be applicable to such canals."

The first word of section 8, as it appears above, is evidently an interpolation, having no relation to the body of the section, without sensible meaning, and should accordingly be disregarded in giving effect to the provisions of the act. (*Stone v. Yeovil*, 1 C. P. Div. [Eng.], 701; *United States v. Stern*, 5 Blatch. [U. S.], 512; *State v. Beasley*, 5 Mo., 91; *State v. Acuff*, 6 Mo., 55.) A careful reading of the two sections last named with the word "if" eliminated from section 8 leaves no room to doubt that the defendant company is within the terms of the act, and that the plaintiff's claim to the contrary is without merit.

4. It is by the plaintiff further argued that it is within the exception contained in section 3, article 1, as follows: "No tract of land shall be crossed by more than one ditch, canal, or lateral without the written consent and agreement

of the owner thereof, if the first ditch, canal, or lateral can be made to answer the purpose for which the second is desired or intended." The evidence relating to this branch of the case is quite voluminous, although the district court, as appears from its findings and conclusions of law, held the foregoing exception not applicable to the facts without determining the question of the capacity of the ditch as already constructed. On behalf of the defendant it is contended, in effect, that the exception of the statute applies to owners and proprietors other than irrigating companies, which corporations, it is argued are not in terms or by implication included therein. The case of *San Luis Land, Canal & Improvement Co. v. Kenilworth Canal Co.*, 32 Pac. Rep. [Col. App.], 860, it is conceded, tends to sustain that contention. Referring to the Colorado statute which provides that no tract or parcel of improved or occupied land shall be burdened with two or more ditches, etc., it is said in the case cited: "We are wholly unable to understand how it can be urged that the defendant company has any right under the provisions of these sections. They clearly, and in unmistakable language, apply to the right of the owner of the lands to assert that his property shall not be burdened with more than one irrigating ditch, provided that one ditch be of sufficient capacity to carry water for the purposes contemplated by the act." We are, however, unable to accept that case as an authoritative interpretation of our statute. The term "no tract of land," as employed, without qualifications, must be held to include the property of corporations as well as natural persons; and such would have been the construction had the statute read, "the land of no person shall be crossed," etc. (*Wales v. City of Muscatine*, 4 Ia., 302; *Ricker v. American Loan & Trust Co.*, 140 Mass., 346; *Norris v. State*, 25 O. St., 217.) But we reach the same conclusion as the district court—presumably by the same course of reasoning—by which the sections are transposed, section 8 of article 2 being regarded

as the enacting clause and section 3 of article 1 as a proviso exempting the exceptional cases therein contemplated from the operation of the act. According to settled rules of construction a proviso which would operate to limit the application of an enacting clause, general in its terms, will be strictly construed, and includes no case not within the letter of the exception. (Endlich, Interpretation of Statutes, sec. 186; *United States v. Dickson*, 15 Pet. [U. S.], 141; *Roberts v. Yarbboro*, 41 Tex., 449; *Epps v. Epps*, 17 Ill. App., 196.) Referring again to the proviso involved, we are first impressed with the fact that the primary object thereof is the protection of land owners rather than the proprietors of irrigating ditches. True, both characters may, as in this instance, be united in one person or corporation, but such cases are exceptions and apparently not within the contemplation of the legislature. It is in the second place noticeable that the act is silent respecting the terms and conditions upon which one irrigating company may make use of the canal or ditch of another. Nor is the proprietor of such a ditch in terms required to supply water upon any terms to a rival corporation. It was at the consultation suggested that it is within the power of a court of equity to prescribe the conditions upon which one irrigating company may connect with the ditch of another; but that assertion rests, to say the least, upon doubtful grounds. Conceding irrigating companies as *quasi*-public corporations, to be subject to the strict obligations of common carriers, it does not follow that they may by the courts be compelled to enter into particular agreements or assume particular relations, however just and equitable, toward each other. That subject has recently engaged the attention of the supreme court of the United States, by which the power to prescribe terms for the interchange of business by connecting carriers is declared to be legislative rather than judicial in character, notwithstanding the provisions of the interstate commerce act. (*Atchison, T. & S. F. R. Co. v.*

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4. Sec. 1, ch. 37, Comp. Stats., permitting a settlement to be made in a bastardy proceeding, does not violate sec. 11, art. 3, of the constitution, providing that no bill shall contain more than one subject, and the same shall be clearly expressed in its title. *Stoppert v. Nierle*..... 107, 117
5. Ch. 10, Session Laws, 1895, amending sec. 145 of the act of 1887, incorporating cities of the metropolitan class (ch. 10, Session Laws, 1887), is not inimical to sec. 11, art. 3, of the constitution, relating to amendment of laws. *State v. Bemis*..... 724
6. Ch. 13, Session Laws, 1891, repealing secs. 136 and 139, ch. 16, Comp. Stats., is not unconstitutional on the ground that the provision of sec. 4 making the repealing statute applicable to pending suits is not expressed in the title of the act. *Kleckner v. Turk* 177
7. The legislature has power to enact a statute to operate as a general saving clause to continue rights and remedies unless repealing statutes express the intention that such rights and remedies shall not be continued. *Id.*

Constitutional Law—concluded.

8. The provision of the charter of the city of Omaha, for a board of fire and police commissioners composed of three members, "at least one from each of the two political parties casting the largest number of votes at the last preceding general election," is not unconstitutional as prescribing party affiliation as a qualification for office. *State v. Bemis*..... 725
9. The provision of the irrigation law of 1889, and the amendment thereof in 1893, abolishing riparian rights in all streams over twenty feet in width, is an invasion of private property and is therefore unconstitutional. *Clark v. Cambridge & Arapahoe Irrigation & Improvement Co.*..... 799

Construction. See STATUTES.

Contempt. See CONTINUANCE, 4.

1. It is a contempt to publish, concerning a pending action, statements tending to prejudice the minds of the public with respect to the merits of the case. *Percival v. State*... 741
2. In a contempt proceeding an answer alleging that defendant did not intend by a publication to reflect upon the integrity or honesty of a judge, or to embarrass or impede the administration of justice, is conclusive, where the publication is not libelous *per se*. *Id.*
3. In proceedings in aid of execution a third person cannot be imprisoned for contempt for failing to comply with an order to turn over property to be applied on a judgment. *In re Havlik*..... 747
4. The affidavit in proceedings for a contempt not committed in presence of the court must disclose sufficient facts to show that the court has jurisdiction. *Hawthorne v. State*... 871
5. Unless the disobedience of an order of court is willful there is no contempt. *Id.*
6. A defendant who cannot on account of insolvency comply with an order to pay money on a judgment is not punishable for a contempt. *Id.*

Continuance. See NEW TRIAL, 1.

1. An application for a continuance is addressed to the discretion of the trial court. *Stoppert v. Nierle*..... 106
Stratton v. Dole 472
2. Case where the action of plaintiff's counsel in forcing a trial in the absence of the attorney for defendant amounted to such misconduct as to justify a new trial. *Chicago, St. P., M. & O. R. Co. v. Deaver*..... 307

Continuance—*concluded*.

3. It is proper to refuse an application to withdraw a juror and continue the case for the purpose of enabling a party to procure a witness, when the adverse party admits the only fact to be proved, except what is cumulative. *Smith v. First Nat. Bank of Chadron*..... 444
4. A continuance should not be granted to enable a party, by proceedings for contempt in the courts of another state, to compel a witness to testify by deposition, there being no presumption that he would be guilty of contempt for refusing to answer questions. *Stratton v. Dole* 472

Contracts. See BREACH OF CONTRACT TO MARRY. CARRIERS, 1-3. DAMAGES, 5. GUARANTY. INTEREST. NEGOTIABLE INSTRUMENTS, 6. PARTNERSHIP, 1. PLEADING, 16. SALES, 11. SCHOOLS AND SCHOOL DISTRICTS, 6. SUBSCRIPTION. USURY.

1. Where a contractor partially erected a building and received payments as the work progressed, owners who agreed to keep the building insured to the extent of their interest are not, after a loss by fire, released from that agreement on the ground they could not procure a responsible company to write insurance to the extent of their interest. *Gallagher v. St. Patrick's Church*..... 535
2. In such a case the failure of the owners to insure the property to the extent of their interest is a complete defense for the sureties on the contractor's bond. *Id.*
3. Where owners of a building in course of construction permit their contractor to continue his work after the date fixed for completion, they waive their right to terminate the contract and complete the building, and are bound by the terms of their agreement. *Id.*
4. One who accepts a conveyance of land upon express condition that he will convey it to another and fails to do so is liable to the latter for such damages as result from expenses of necessary litigation or from the loss of an opportunity to sell at a good price while the conveyance is wrongfully withheld. *McMurtry v. Blake*. 213
5. It is competent for parties in making contracts for accident insurance to agree that the company shall not be liable where injury results under circumstances enumerated in the policy. *Travelers Ins. Co. v. Snowden*..... 249
6. An action for breach of contract was not prematurely begun May 13, where defendant violated an agreement to furnish plaintiff a herd of cattle May 1, to be cared for

Contracts—concluded.

and herded by the latter during the ensuing season at a fixed sum per head. *Hamilton v. Goff*..... 339

7. An action to recover wages under a contract for personal services can only be sustained by proof that the services were performed. *Culbertson Irrigating & Water Power Co. v. Wildman*..... 663

Conversion. See CARRIERS, 3. PRINCIPAL AND AGENT, 2. TORTS. TROVER AND CONVERSION.

Conveyances. See CONTRACTS, 4. CHATTEL MORTGAGES. FRAUDULENT CONVEYANCES. MORTGAGES.

Corporations. See FRAUDULENT CONVEYANCES, 5. PLEADING, 1.

1. Sec. 139, ch. 11, Gen. Stats., 1873, making stockholders individually liable for corporate debts where there has been a failure to give notice and other requisites of organization, is penal. *Kleckner v. Turk*..... 176
2. Sec. 136, ch. 11, Gen. Stats., 1873, repealed April 6, 1891, providing for publication of notice of corporate debts, and for liability of stockholders, was penal. *Id.*
3. One who contracted with a corporation, and thus recognized its corporate capacity, cannot attack the validity of the incorporation in order to make the stockholders individually liable, where the articles of incorporation were adopted and filed in substantial compliance with law, though the incorporation might be declared illegal in an action by the state. *Id.*
4. A president of a loan company, who allowed trust-deed securities to be made to himself as trustee, thereby gained no right to use such designation to the injury of the company, the beneficiary contemplated in the deeds. *Tulleys v. Keller*..... 220
5. Case involving the right of a loan company to make use of the name of its president as trustee in enforcing its rights under trust deeds. *Id.*
6. Actions against a domestic corporation may be brought in any county where it maintains a place of business and has an agent to conduct such business, though its principal office and chief officer are in another county. *Fremont Butter & Egg Co. v. Peters*..... 356
7. Dividends belong to the persons in whose names the shares of stock are registered, but may be made the subject of a valid contract the same as other personal property. *Cook v. Monroe*..... 349

Corporations—concluded.

8. Evidence *held* sufficient to justify the court in directing a verdict for plaintiff in an action to recover dividends received by defendant after he transferred the stock upon which they were declared. *Id.*
9. A creditor who has not reduced his claim against a corporation to judgment cannot maintain an action against the stockholders to enforce the statutory liability for a failure to publish the annual notice of indebtedness as required by law. *Ball v. Wicks*..... 367
10. Directors of an insolvent corporation cannot take advantage of their position to obtain a preference of debts owing by the corporation to themselves. *Tillson v. Downing*..... 549
11. Directors of an insolvent corporation cannot prefer debts to third persons for which they are obligated as sureties. *Id.*
12. Solvent corporations have the same dominion over their own property as individuals. *Id.*

Costs. See ATTORNEYS' FEES.

Counter-Claim. See SET-OFF AND COUNTER-CLAIM.

Counties. See TOWNSHIP BONDS.

County Courts. See BASTARDY, 1. BILL OF EXCEPTIONS, 4-6.

Courts. See CONTEMPT. EQUITY, 1, 2. JUSTICE OF THE PEACE. OFFICE AND OFFICERS, 2, 3. RES ADJUDICATA, 1.

Covenants.

A covenant against incumbrances is a personal obligation and does not run with the land where it is broken at the time it is made. *Campbell v. McClure*..... 608

Criminal Law. See CONTEMPT. HABEAS CORPUS. HOMICIDE. INSTRUCTIONS, 5, 6. JURY. WITNESSES, 6.

1. All presumptions exist in favor of the regularity of judgments of courts of general jurisdiction. *Wright v. State*... 44
2. An allegation of error based on the ground that a particular charge of the information was not included in the original complaint will be ignored where such complaint has been omitted from the record. *Id.*
3. Affidavits used as evidence below will not be considered on review unless preserved by a bill of exceptions. *Id.*
4. A sentence pronounced by the trial court will not be re-

Criminal Law—continued.

- versed as being excessive unless there has been a clear abuse of discretion. *Id.*
5. Prejudicial error will not be found in the rulings of the trial court during the *voir dire* examination of a venireman unless an abuse of discretion is shown. *Basye v. State* 261
6. The finding of the trial court in deciding a challenge to a juror for cause will not be set aside by the supreme court unless it is clearly wrong. *Id.*..... 262
7. Where the surname and initials of the Christian name of a witness appear upon the information it is a sufficient compliance with the statute requiring names of the state's witnesses to be indorsed on the information. *Id.*
8. The order in which a party shall introduce his proof is, to a great extent, discretionary with the trial judge, and the action of the court in that regard will not be cause for reversal where no abuse of discretion is shown. *Id.*
9. It is permissible on cross-examination of a witness testifying in reference to character or reputation, to ascertain the extent of his information, the foundation for his opinion or the data from which he draws his conclusion. *Id.*
10. Upon cross-examination a witness may be asked, with a view to lessen the effect of his testimony as to general reputation, but not for the purpose of establishing the fact to be proved, whether he has not heard certain enumerated reports which tend to contradict the purport and effect of his testimony given on direct examination. *Id.*
11. A person who is unlawfully attacked in such a manner as to excite in him a reasonable belief that he is in danger of losing his life at the hands of the assailant, or receiving great bodily injury, may use such force to repel the attack as at the time appears to him to be reasonably necessary. *Barr v. State*..... 459
12. A person unlawfully attacked is, in defending himself, justified in acting upon the facts as they appear to him, and is not to be judged by the facts as they actually exist. *Id.*..... 458
13. Upon change of venue the clerk must transmit a transcript of the proceedings, with the original indictment or information, to the clerk of the district court of the county where the cause is to be tried. *Id.*

Criminal Law—*concluded*.

14. Where a charge considered as a whole correctly states the law, it is sufficient. *Debney v. State*..... 856
15. An erroneous instruction is not ground for reversal where it was not prejudicial to defendant. *Id.*
16. Where instructions were not excepted to at the trial, they will not be reviewed. *Gravely v. State*..... 878

Cross-Bills. See JUDGMENTS, 5. PLEADING, 6-8.

Damages. See ATTORNEYS' FEES. CARRIERS, 9. CLERK OF DISTRICT COURT, 2. CONTRACTS, 4. DEATH BY WRONGFUL ACT. EMINENT DOMAIN. LIBEL AND SLANDER. MASTER AND SERVANT, 9. MUNICIPAL CORPORATIONS, 6, 12, 13, 18, 19. OFFICE AND OFFICERS, 8. RAILROAD COMPANIES, 3. REPLEVIN, 7. RIPARIAN RIGHTS, 2. SALES, 9. WASTE. WATER AND WATER-COURSES.

1. A city may be liable for damages for negligently making street improvements which cause surface water to flow upon the premises of a private owner. *City of Beatrice v. Leary*..... 149
2. The owner of a vacant lot upon which a pond is situated is not liable for the death of a boy who went upon the premises for amusement without invitation, and was drowned. *Richards v. Connell*..... 467
3. Evidence held sufficient to sustain a judgment for plaintiff in an action by her to recover from defendant damages for breach of a contract to marry. *Stratton v. Dole*..... 474
4. Right of owners of a building to recover damages for failure of the builder to complete it at the time fixed by the building contract. *Gallagher v. St. Patrick's Church*..... 535
5. One who was induced by a third person to part with property in exchange for notes which the latter promised to buy may recover from the promisor the damages resulting from a violation of the promise. *Stratton v. Meredith*..... 622
6. Plaintiff cannot recover damages for breach of a contract to employ him under a petition to recover wages earned. *Culbertson Irrigating & Water Power Co. v. Wildman*..... 663
7. Where the wages fixed by a contract of employment are sixty dollars per month in cash and forty dollars per month in water rights, the employee's measure of damages is one hundred dollars per month in an action for breach of the contract. *Id.*..... 664
8. A verdict for plaintiffs for five thousand dollars held to be

Damages—concluded.

sustained by the evidence in an action by a widow and her children on a saloon-keeper's bond, where the death of the husband resulted from intoxication. *Gran v. Houston*..... 815

Death by Wrongful Act. See INTOXICATING LIQUORS, 3.

In a suit by a widow as administratrix to recover from a corporation damages for negligently causing the death of her husband, a petition alleging that deceased left seven minor children who were wholly dependent upon him for support and maintenance, is not open to the objection that it fails to aver facts showing the wife and next of kin sustained pecuniary injuries within the meaning of ch. 21, Comp. Stats. *Kearney Electric Co. v. Laughlin*..... 390

Deceit. See DAMAGES, 5.**Decrees.** See JUDGMENTS.**Deeds.** See COVENANTS. MORTGAGES, 4, 15, 16. TAXATION, 5.**Deficiency Judgments.** See APPEAL BONDS, 5, 6. MORTGAGES, 2, 14.**Delivery Bonds.** See ATTACHMENT, 2-4.**Depositions.**

Provisions for taking testimony in one state to be used in another, and to enforce attendance of witnesses for that purpose, are, in the absence of express statutory provision to the contrary, extrajudicial as to courts of the state where such evidence is sought. *Stratton v. Dole* 472

Disability. See LIMITATION OF ACTIONS, 1.**Dismissal.** See REVIEW, 2.**Disorderly Houses.**

Evidence held sufficient to sustain a conviction for violating sec. 210, Criminal Code. *Wright v. State*..... 44

Dividends. See CORPORATIONS, 7, 8.**Docket Entries.** See JUSTICE OF THE PEACE, 3.**Domicile.**

1. The words "residence," and "usual place of residence," as employed in statutes, are generally synonymous with the term "domicile." *Wood v. Roeder*..... 311
2. The residence essential to confer jurisdiction is a legal one equivalent to the domicile of the defendant. *Id.*
3. The domicile of a defendant is that place where he has his fixed and permanent home, and to which, when absent, he has the intention of returning. *Id.*

Domicile—concluded.

4. To effect a change of domicile there must not only be a change of residence, but an intention to permanently abandon the former home. *Id.*
5. The mere residing at a different place, though evidence of intention, does not *per se* constitute a change of domicile. *Id.*

Drainage. See MUNICIPAL CORPORATIONS, 1, 5, 6.**Duress.**

- A mortgage to secure a debt, executed without threats or promises, will not be set aside on the ground it was given to obtain the dismissal of criminal proceedings, where the creditor previously stated to the debtor that the promise of such a dismissal could not be made. *Hargreaves v. Menken*..... 668

Ejection. See PLEADING, 16.**Election of Remedies.**

1. A grantee who received a conveyance and agreed to pay a debt of the grantor cannot defend a suit by the latter's creditor on the ground that plaintiff previously sued the grantor for the debt and attached the property conveyed as belonging to him. *Davis v. Nat. Bank of Commerce*..... 589
2. Where two causes of action in a petition are identical, error does not result from a failure to require plaintiff to elect as to the cause upon which he will proceed to trial. *Pollock v. Whipple* 844

Elections. See TOWNSHIP BONDS.**Electric Lighting Systems.** See MUNICIPAL CORPORATIONS, 7-10.**Eminent Domain.** See RIPARIAN RIGHTS, 2.

1. Correctness of an instruction as to damages resulting to property by taking land for railroad purposes. *Atchison & N. R. Co. v. Boerner* 453
2. Where several contiguous town lots are treated by the owner as one piece of property, the injury to the whole by the construction of a railroad should be considered, though but a portion is taken and it alone is described in the petition for appraisalment. *Id.*
3. A judgment of the district court on appeal from an award of damages is conclusive upon the parties as to all matters necessarily in issue. *Id.*
4. The power to determine when the exigencies of the public demand the taking of private property has been commit-

Eminent Domain—concluded.

- ted to the legislature and not to the courts. *Paxton & Hershey Irrigating Co. v. Farmers & Merchants Irrigation Co.*..... 884
5. "Public use" may be confined to the inhabitants of a restricted locality, but the use must be common, and not to a particular individual. *Id.*✓
 6. The use of water for irrigating purposes under the Rayner irrigation law is a public use. *Id.*
 7. Under the Rayner irrigation law, irrigating companies may acquire by condemnation the right of way for canals and reservoirs. *Id.*

Equity. See INJUNCTION. JUDGMENTS, 6-9. SUBROGATION. TAXATION, 1. TRUSTS.

1. When a court of equity has acquired jurisdiction of a cause for any purpose, it may retain it for all purposes. *Disher v. Disher*..... 100
Flentham v. Steward 641
2. There exists no power in courts of equity to supply lacking remedies for the regulation of the affairs of a church organization. *Powers v. Budy* 208
3. One who asked a court of equity to enforce his claim to the right to use his name as trustee to the disadvantage of the beneficiary cannot complain because the court, having taken jurisdiction of the subject-matter for such purpose, administered complete relief as between all parties to the litigation. *Tulleys v. Keller*..... 220
4. Where a purchaser obtains merchandise on credit through fraud and disposes of it for money and other property, equity may award the seller any particular property or a lien thereon, which can be identified as having been bought with the goods fraudulently acquired from the seller. *Farwell v. Kloman*..... 425
5. Where a purchaser obtains merchandise on credit through fraud, disposes of it for property which he mingles with that already in his possession and makes a voluntary assignment, a court of equity should not decree the entire estate in the hands of the assignee a trust fund, and give the defrauded vendor, as beneficiary, a lien thereon. *Id.*

Error. See REVIEW.

Estates. See TAXATION, 3.

Estoppel. See CORPORATIONS, 3. ELECTION OF REMEDIES, 1. INTOXICATING LIQUORS, 6.

1. A property owner by petitioning a city to grade a street

Estoppel—concluded.

does not thereby estop himself from claiming damages resulting from the negligent omission of the city to provide suitable outlets for surface water. *City of Beatrice v. Leary*, 151

2. Corporators will not be heard to allege failure to become a *de jure* corporation in order to escape individual liability for neglecting to comply with statutory requirements. *Kleckner v. Turk*..... 177
3. The facts constituting an estoppel *in pais* must be pleaded. *Scroggin v. Johnston*..... 714
4. A seller is estopped from asserting that his representations were not warranties where he knows they were regarded as such by the purchaser and relied upon. *Erskine v. Swanson*..... 767

Estrepelement. See WASTE.

Evidence. See BASTARDY, 3, 5, 7. BREACH OF CONTRACT TO MARRY. CARRIERS, 8, 9. CONTEMPT, 2. CRIMINAL LAW, 9, 10. DEPOSITIONS. FORGERY. FRAUDULENT CONVEYANCES, 2. HOMICIDE. INTOXICATING LIQUORS, 1, 7, 8. JURY, 1. MASTER AND SERVANT, 5, 7. MECHANICS' LIENS. MORTGAGES, 2-4, 19. MUNICIPAL CORPORATIONS, 3, 4. NEGLIGENCE, 3. NOVATION. PLEADING, 2. PRINCIPAL AND AGENT, 5. REPLEVIN, 2, 8. SALES, 6, 11, 12. WITNESSES.

1. As between the original parties to the blank indorsement of a note by the payee to the purchaser, parol evidence is admissible to show the actual contract. *True v. Bullard*... 410
2. Parol evidence is inadmissible to vary or contradict the terms of a written contract. *Quinn v. Moss*..... 614
3. Expert testimony as to alteration of a note. *Davis v. Snyder* 417
4. Where the value of a stock of dry goods is in issue it is not competent to inquire of a witness not shown to have seen, or to know anything in regard to, the stock, what proportion of the original cost would represent the value of a stock of dry goods after it had been in a store three months. *Smith v. First Nat. Bank of Chadron* 444
5. The existence of a record must be proved by its production or by an authenticated copy. *Id.*
6. The non-existence of a record may be proved by the oath of any one who has made a search therefor. *Id.*
7. Courts take notice without proof that the Republican river is unnavigable. *Clark v. Cambridge & Arapahoe Irrigation & Improvement Co.*..... 798

Evidence—concluded.

8. A coroner who is a physician and surgeon may state his opinion as to the manner of a death where no one was present when it occurred. *Gran v. Houston*..... 816
9. Evidence held sufficient to justify a conviction for murder in the first degree. *Debney v. State* 856
10. Sufficiency of evidence to sustain a verdict for manslaughter. *Gravely v. State*..... 878

Exceptions. See BILL OF EXCEPTIONS.**Executions.** See APPEAL BONDS, 6. JUDICIAL SALES. REPLEVIN, 5.

1. The test of the validity of a levy upon personal property is whether or not the acts of the officer have been such as would make him liable as a trespasser but for the protection of his writ. *Grand Island Banking Co. v. Costello*..... 119
2. Chattels garnished in the hands of a mortgagee are in custody of the law and not subject to seizure on execution. *Id.*
3. After property has been sold under execution the appraisalment can only be attacked for fraud. *Kearney Land & Investment Co. v. Aspinwall*..... 601
4. Objections to the appraised value of property for sale under execution should be made and filed before sale in the court where the case is pending, with a motion to set aside the appraisement. *Id.*
5. It is the duty of an officer holding an execution for the sale of real estate to cause it to be appraised immediately and deposit a copy of the appraisement with the clerk who issued the order for the sale. *Id.*
6. A purchaser at execution sale of land takes only the interest of the judgment debtor at the time the judgment became a lien. *Hargreaves v. Menken*..... 668
7. In proceedings in aid of execution, a third person who has in his hands non-exempt property of a judgment debtor may be ordered to apply it in payment of the judgment, and the order may be enforced by legal methods. *In re Havlik* 747
8. Necessary allegations of an affidavit to punish defendant for a contempt in failing to comply with an order in aid of execution directing him to pay money on a judgment. *Hawthorne v. State*..... 871

Executors and Administrators.

1. An order authorizing an administrator to sell mortgaged

Executors and Administrators—concluded.

land to pay debts, will not be reversed where the proofs fail to show that the order was improper. *Waldow v. Beemer*..... 626

2. The regularity of the appointment of an administrator cannot be inquired into in resisting his application for license to sell property to pay debts. *Id.*

Exemptions. See HOMESTEAD.

Lands acquired under the federal homestead law are exempt from liability for the debts of the patentee created before the issuing of the patent, though the patentee conveyed the land and subsequently re-acquired the title. *Brandhoefer v. Bain*..... 781

Fees. See OFFICE AND OFFICERS, 8.**Fellow-Servants. See MASTER AND SERVANT, 8.****Final Order. See JUDGMENTS, 1, 2.****Findings. See TRIAL, 1, 2.****Fire and Police Commissioners. See MUNICIPAL CORPORATIONS, 20.****Foreign Judgments. See JUDGMENTS, 4.****Forgery.**

1. Evidence that a person unlawfully disposed of mortgaged chattels is not competent to prove that he committed a forgery. *Stratton v. Nye*..... 621
2. The insolvency of a person cannot be shown to establish that he committed a forgery. *Id.*
3. In a suit on a note, evidence that a defendant stated he could imitate the signature of any person, was held incompetent, in the case stated in opinion, to show that the signature of another defendant was a forgery. *Id.*..... 622

Forum of Jurisdiction. See VENUE.**Fraud. See EQUITY, 4, 5. FRAUDULENT CONVEYANCES.****Fraudulent Conveyances. See CORPORATIONS, 10, 11. ELECTION OF REMEDIES, 1. WITNESSES, 2.**

1. The fact that a chattel mortgage covers property in value largely in excess of the debt secured does not raise a conclusive presumption of fraud. *Kilpatrick-Koch Dry Goods Co. v. Strauss* 793
2. Excessive chattel mortgage security is merely evidence of fraud to be considered in connection with other facts. *Id.*
3. The disproportion between the value of mortgaged chattels

Fraudulent Conveyances—concluded.

and the amount secured affords no basis for a presumption of law, but is a matter of evidence to be accorded such weight as in the light of surrounding circumstances it is entitled to receive in the determination of a question of fact. *Grand Island Banking Co. v. Costello*..... 119

4. The validity of a mortgagee's right to chattels may be attacked by a garnishing creditor by alleging and proving fraud or by an actual levy on the mortgaged chattels. *Id.*
5. Sufficiency of evidence to justify a finding of fraud as to creditors of an insolvent corporation, where the latter, before closing business, transferred to a stockholder a sufficient amount of bills receivable to secure his claims. *Wortendyke v. Salladin*..... 755

Gambling.

A place kept for gambling purposes is a public nuisance. *Hill v. Pierson* 503

Garnishment. See EXECUTIONS, 2. MORTGAGES, 21.

An order of garnishment cannot be issued to a county other than that in which the principal action is brought. *South Omaha Nat. Bank v. Farmers & Merchants Nat. Bank*..... 29

Governor. See OFFICE AND OFFICERS, 1-5.

Guaranty. See NEGOTIABLE INSTRUMENTS, 9. PRINCIPAL AND SURETY, 3. SALES, 12, 13.

A guarantor is not released from a written guaranty to pay for cigars sold to a third person, on the ground that by a subsequent agreement between the buyer and seller the cigars of a particular brand were exchanged for an equal number of a different brand of the same value and not less salable. *Quinn v. Moss*..... 614

Habeas Corpus.

1. Mere irregularities and errors in the proceedings in a criminal case under which a person is imprisoned cannot be reviewed on *habeas corpus*. *In re Havlik*..... 747
2. Where the law does not authorize contempt proceedings under which a person is imprisoned, he may be discharged on *habeas corpus*. *Id.*

Harmless Error. See INSTRUCTIONS, 2. TRIAL, 8.

Homestead. See EXEMPTIONS.

A mortgagor whose property was sold under a decree of foreclosure may claim the surplus proceeds in lieu of his homestead exemption any time before the final distribution of such surplus. *Hooper v. Casletter*..... 69

Homicide.

1. Sufficiency of foundation for admitting in evidence a confession of defendant's guilt. *Baye v. State* 262
2. In a prosecution for murder it is competent for the state to prove the description and location of the wounds inflicted by the defendant upon the deceased, as tending to establish whether or not death resulted therefrom. *Id.*
3. Dying declarations, in order to be admissible, must have been made under a sense of impending death, and it is competent for the party offering them to prove the physical condition of the deceased at the time they were made. *Id.*
4. On a trial for murder, evidence tending to show the defendant's general reputation as a peaceable and quiet man in the community in which he resided prior to the offense charged is competent, but his reputation for honesty and integrity is not admissible. *Id.*
5. In a prosecution for murder, where the circumstances tend to establish self-defense, evidence of the quarrelsome and irritable disposition of the deceased, and of threats recently made by him against the accused, which were communicated to the latter prior to the killing, is admissible. *Id.*
6. One charged with murder should be tried under the laws in force when the fatal wound was inflicted, though death did not occur until a subsequent date. *Debney v. State*.... 856
7. An instruction defining the word "deliberation" was held not prejudicial to defendant in a prosecution for murder. *Id.*
8. The charge of the court upon the subject of intoxication was held applicable to the evidence in a prosecution for murder. *Id.*
9. The applause of by-standers at the time the county attorney closes his remarks in a trial for murder is not always prejudicial to defendant where it is immediately suppressed and the offenders rebuked. *Id.*
10. Sufficiency of evidence to sustain a conviction for murder in the first degree. *Id.*
11. In a trial for murder the state may adduce evidence tending to show a motive for the homicide. *Gravely v. State*... 878
12. Sufficiency of evidence to sustain a verdict for manslaughter. *Id.*

Hospital for Insane. See OFFICE AND OFFICERS.

Houses of Prostitution. See DISORDERLY HOUSES.

Husband and Wife. See CONFLICT OF LAWS. LIBEL AND SLANDER. MUNICIPAL CORPORATIONS, 13. WITNESSES, 2-5.

Impaneling Jury. See JURY.

Indemnity. See PRINCIPAL AND SURETY, 1.

Indictment and Information. See CRIMINAL LAW, 13.

Where the surname and initials of the Christian name of a witness appear upon the information, it is a sufficient compliance with the statute requiring names of the state's witnesses to be indorsed on the information. *Baye v.*

State..... 262

Indorsements. See NEGOTIABLE INSTRUMENTS, 4-7.

Informations. See INDICTMENT AND INFORMATIONS.

Informers. See RAILROAD COMPANIES, 1, 2.

Injunction. See ATTORNEYS' FEES. EQUITY, 3. REGISTRATION, 2.

1. Whenever waste threatened would amount to a manifest injury to an estate and a wanton abuse of the rights of a tenant for life, he may be restrained by injunction on petition of the reversioner. *Disher v. Disher*..... 100
2. A public nuisance, criminal in its nature, will only be enjoined at the instance of a private person upon a showing of special injury. *Hill v. Pierson*..... 503
3. A plaintiff who by his laches made it impossible to prevent the completion or use of public works without great injury to defendant, or inconvenience to the public, is not entitled to the preventive remedy of injunction. *Clark v. Cambridge & Arapahoe Irrigation & Improvement Co.*..... 799

Insanity. See LIMITATION OF ACTIONS, 1.

Insolvency. See CONTEMPT, 6. CORPORATIONS, 10, 11. EQUITY, 5.

Instructions. See HOMICIDE, 7, 8. MASTER AND SERVANT, 3, 4. NEW TRIAL, 3. REVIEW, 19.

1. Instructions in a case should be few in number, and should present to the jury the law applicable to the issues in the case in simple language and terse sentences. *City of Beatrice v. Leary*..... 151
2. The refusal to give a correct instruction relating solely to the measure of damages is not prejudicial error, where the jury by a verdict for the defendant has shown that it was

Instructions—concluded.

- not brought to a consideration of the damages. *Montgomery v. Willis*..... 434
3. In an action to recover damages for personal injuries it is not, in general, erroneous to refuse instructions directing the attention of the jury to special facts as demanding greater care than usual, where the court gave correct instructions as to negligence and contributory negligence. *Chicago, B. & Q. R. Co. v. Putnam*..... 440
4. An assignment of error as to instructions *en masse* will be overruled when one of them is found to be correct. *Smith v. First Nat. Bank of Chadron*..... 448
Ripp v. Hale..... 567
Wortendyke v. Salladin..... 755
Pollock v. Whipple 844
5. In a prosecution for a felony error cannot be predicated upon the failure of the trial court to define a lesser offense included in the crime charged, unless requested so to do. *Barr v. State*..... 458
6. Where the law is incorrectly stated in one instruction, the error is not cured by another instruction which correctly propounds the law upon the same subject. *Id.*
7. It is error for the court to refuse an instruction requested where it is pertinent and applicable to one branch of the case not covered by the charge. *Case v. Case*..... 493
8. In the absence of exceptions to rulings in giving or refusing instructions, assignments of error relating to such rulings will be overruled. *Sigler v. McConnell*..... 598
9. An instruction is erroneous which requires a jury to base its verdict on a matter which forms only a portion of the evidence bearing on the principal issue and disregards the determination of that issue itself, and such error is not cured by other instructions stating the issue correctly. *Burlingim v. Baders*..... 673
10. In charging a jury the repetition of a proposition in proper connection with different facts is not ground of error. *Gran v. Houston*..... 813
11. A party who did not request a proper instruction cannot complain because the one given should have contained a more extended statement. *Id.*..... 815

Instruments. See ALTERATION OF INSTRUMENTS.

Insurance. See SUBROGATION, 6.

1. Validity of clauses in accident insurance contracts except-

Insurance—concluded.

- ing the company from liability where injury results under circumstances enumerated in the policy. *Travelers Ins. Co. v. Snowden*..... 249
2. Where an insurer, either before suit or by answer in an action, denies that the policy was in force when the loss occurred, it cannot avail itself of a provision in the policy that no action shall be brought until sixty days after receipt of proofs of loss and adjustment. *Home Fire Ins. Co. v. Fallon*..... 554
3. Sufficiency of evidence to show that the person to whom an application for insurance was made was the agent of the company issuing the policy, and that the company denied liability before suit was brought. *Id.*
4. Misstatements written in an application for insurance by the insurer's agent, to whom the insured correctly stated the facts, do not invalidate the policy where the latter did not consent to or know of such misstatements. *Id.*

Interest.

1. Where a note bears lawful interest before maturity and a higher and lawful rate thereafter, the rate it draws to date of maturity is the contract rate for that time, and the rate it draws after maturity is the contract rate from that date, within the meaning of sec. 3, ch. 44, Comp. Stats. *Havemeyer v. Paul*..... 374
2. Under sec. 3, ch. 44, Comp. Stats., a judgment based upon a contract for the payment of money draws the contract rate of interest where the rate is lawful and exceeds seven per cent. *Id.*
3. Under sec. 3, ch. 44, Comp. Stats., where the parties to a contract for the payment of money have not agreed upon a rate of interest, or agreed upon a rate less than seven per cent, a judgment based on the contract bears seven per cent interest. *Id.*

Interpleader.

Where a stranger to a contract of bailment claims property in possession of the bailee, the latter has a remedy by bill of interpleader requiring the claimants to the property to litigate the question of title between themselves. *Shelberg v. Fremont, E. & M. V. R. Co.*..... 487

Intoxicating Liquors.

1. A saloon-keeper's bond is not invalid merely because it makes reference to incurring liability under the liquor law as ch. 61, Gen. Stats., 1887, instead of ch. 61, Session

Intoxicating Liquors—concluded.

- Laws of 1881, and it should not be excluded from evidence on that ground. *Plucknett v. Tippey*..... 342
2. The liability of the sureties to the extent of the penalty is the same as that of the principal in an action on the bond of a saloon-keeper who sold liquor to plaintiff's decedent. *Gran v. Houston*..... 814
3. The action on a saloon-keeper's bond, authorized by ch. 50, Comp. Stats., is not an action for death caused by intoxication, but for loss of means of support resulting from death. *Id.*
4. Elements of damage in a suit under ch. 50, Comp. Stats., by a widow and children against a saloon-keeper and the sureties on his bond, where death resulted from the use of liquor sold to the husband and father. *Id.*
5. It was held that defendants, by their answer in an action on a saloon-keeper's bond, admitted the execution of the bond, and that the instructions in the case were not erroneous. *Id.*..... 815
6. The fact that a wife consented to sales of liquor to her husband is no defense to an action by her and her children against the saloon-keeper for loss of support through disability of the husband resulting from intoxication. *Id.*
7. Proof that a husband's earnings were the source of the support of the wife and children is admissible in an action for damages resulting from the death of the husband by intoxication. *Id.*
8. Evidence that the saloon-keeper instructed his servants not to sell liquor to the deceased is inadmissible in an action on the saloon-keeper's bond for loss of support. *Id.*

Irrigation. See CONSTITUTIONAL LAW, 9.

1. The provision of sec. 3, art. 1, of the Rayner irrigation law, that no tract of land shall be crossed by more than one ditch, includes land owned by corporations as well as that owned by natural persons. *Paxton & Hershey Irrigating Co. v. Farmers & Merchants Irrigation Co.*..... 885
2. The Rayner irrigation law does not confer upon one irrigating company any right to connect with the ditches of another or take water therefrom without the consent of the proprietor. *Id.*
3. Under the exception in sec. 3, art. 1, of the Rayner irrigation law, no tract of land shall, without the consent of the owner, be burdened with two or more ditches for the watering of the same territory. *Id.*

Judgments. See APPEAL BONDS, 7. INTEREST, 3. JUSTICE OF THE PEACE, 2-4. MORTGAGES, 2, 14. REPLEVIN, 5. RES ADJUDICATA.

1. An order refusing to require the clerk of the district court to approve a supersedeas bond is a final order. *State v. Baker*..... 39
2. Where plaintiff in his petition prays for partition of land, or for a sale thereof in case it cannot be divided, a record showing that a demurrer to the answer was sustained, and merely reciting "judgment of partition as prayed for in the petition," does not disclose a final judgment. *Atwood v. Atwood*..... 201
3. The lien of a judgment on mortgaged land is subject to mortgagor's homestead rights. *Hooper v. Castetter*..... 69
4. An action on a foreign judgment cannot be defeated on the ground that it was obtained by the fraudulent conduct of an attorney who acted for both parties, where the defendant with knowledge of the facts failed to object to such conduct. *Cox v. Barnes*..... 172
5. In an action *in rem* a decree based upon the cross-bill of a defendant filed after answer day, his co-defendant not appearing, is irregular, but not void for want of jurisdiction. *Patten v. Lane*..... 333
6. Where land intended to be included in a mortgage is omitted by mistake, and a transcript of judgment against the mortgagor is subsequently filed in the district court, the lien thereof is subject to the equity of the mortgage. *Chadron Building & Loan Association v. Hamilton*..... 370
7. The lien does not exceed the actual interest the debtor had in the land at the time a transcript of judgment from a justice of the peace was filed in the district court, and is subject to all equities then existing against such debtor. *Id*..... 369
8. In a suit to foreclose a mortgage the owner of the equity who answered the petition is not concluded by a decree conforming to the prayer of a supplemental petition filed by plaintiff after answer day without notice. *Havemeyer v. Paul*..... 373
9. Where the failure to file a motion to set aside a judgment results from the laches of counsel, it will not be set aside in equity, after the term expires, on the ground that the clerk did not make the journal entry immediately. *Slater v. Skirving*..... 594
10. Right of certain defendants to have a judgment against

Judgments—concluded.

- them set aside on the ground that a co-defendant was made a party for the sole purpose of obtaining service on them in a different county. *Id.*..... 597
11. A judgment in a proceeding under an unconstitutional statute is not void where jurisdiction of the action exists independently of the statute. *Brandhoefer v. Bain*..... 781

Judicial Notice. See EVIDENCE, 7.**Judicial Sales.** See EXECUTIONS.

1. An officer conducting a judicial sale has no authority to sell on credit or accept in payment of a bid anything but money, unless authority to do so is given by the decree or the law governing the sale. *Hooper v. Castetter*..... 67
2. An officer can make a judicial sale only on such terms as are provided by the decree and the law governing sales. *Id.*
3. An officer who states in his return that he sold the property to a designated bidder, is conclusively presumed to have made the sale for cash, less the amount of the purchaser's lien, if any, unless authorized by the decree to extend credit. *Id.*
4. A purchaser at a foreclosure sale of mortgaged premises will not be relieved from completing his bid on the ground of prior incumbrances, where the true condition of the title is set out in the record of the proceedings. *Id.*
5. Grounds for setting aside a judicial sale will not be considered on review unless they were presented below. *Id.*
6. After confirmation a purchaser at judicial sale under mortgage foreclosure who accepts the sheriff's deed and applies for, and obtains, a writ of possession thereby waives all errors in the sale and all objections to the order of confirmation. *Id.*..... 68
7. Where the conclusion of the trial judge in confirming a mortgage foreclosure sale is sustained by the record and evidence, the order of confirmation will be affirmed. *Johnson v. Thorpe*..... 347
- *Johnson v. Hubbard*..... 348

Jurisdiction. See APPEAL BONDS, 7. BASTARDY, 1. CONTEMPT, 4. DOMICILE. EQUITY, 1, 3. HABEAS CORPUS, 2. JUDGMENTS, 5. JUSTICE OF THE PEACE, 1. OFFICE AND OFFICERS, 2, 3. RECEIVERS, 3. REVIEW, 26.

Jury. See NEW TRIAL, 4, 5.

1. The appearance and general demeanor of a juror while

Jury—concluded.

- being examined may be taken into consideration in determining his competency to serve. *Basye v. State* 261
2. During the impaneling of a jury the defendant in a prosecution for murder may ask a juror who read newspaper accounts of the homicide, whether or not he has formed any opinion or conclusion as to defendant's guilt, or as to whether or not the crime of murder has been committed. *Id.*
 3. It is proper to ask a venire-man whether the fact defendant is charged with a crime would have any weight with the former, and whether he could give the same credit to the testimony of the accused that he could give to the testimony of any other witness, under the same circumstances. *Id.*
 4. On *voir dire* examination of a juror the parties have a right to put pertinent questions for the purpose of ascertaining whether or not there exists sufficient grounds for a challenge for cause, and also to enable them to properly exercise the statutory right of peremptory challenge. *Id.*
 5. An opinion formed by a juror does not affect his competency, or afford cause for challenge, unless it is unqualified as to the guilt or innocence of the accused of the offense charged. *Id.* 262.
 6. An opinion founded solely on rumor and newspaper reports will not disqualify a juror where it is shown that the opinion will not interfere with his rendering a fair and impartial verdict upon the evidence under the instructions. *Id.*
 7. The order of exercising peremptory challenges in a criminal case is left to the sound discretion of the trial court. *Gravelly v. State* 878.

Jury Trial. See EQUITY, 1.

- A party who does not demand a jury or object to a trial to the court may thereby waive his right to a trial by jury. *Davis v. Snyder* 415.

Justice of the Peace. See APPEAL BONDS, 3, 4. BILL OF EXCEPTIONS, 4.

1. A covenantee who paid taxes to discharge a lien existing when he received a deed containing a covenant against incumbrances may recover the amount of the lien from the covenantor in an action before a justice of the peace, as such an action does not relate to the title to the land. *Campbell v. McClure* 608.
2. In an action before a justice of the peace, where defendant

Justice of the Peace—concluded.

does not appear, the record must show legal service of summons. *Muller v. Plue*..... 701

3. A justice of the peace must enter upon his docket the day and hour fixed in the summons for the time of trial, and the omission to do so is fatal, where there is no appearance of the defendant. *Id.*
4. Where defendant fails to appear, the record must disclose that the plaintiff appeared within one hour of the time named in the summons for appearance, or jurisdiction is lost. *Id.*

Laches. See INJUNCTION, 3. JUDGMENTS, 9.

Landlord and Tenant. See WASTE.

1. The rule that where a tenant for a year remains in possession over his term, and is recognized as a tenant by the landlord, and no new contract is shown, he becomes a tenant from year to year, is only a rule of presumption, which may be rebutted by proof of a different agreement, or of facts inconsistent with the presumption. *Montgomery v. Willis*, 434
2. Where, before the expiration of a lease for a year, the tenant gives notice that he will not remain for another year, but for a short period and pay rent for any time he may remain, and the landlord acquiesces and receives the rent, a tenancy for another year is not created. *Id.*
3. A tenant who remains over his term with the understanding that he is to occupy the premises for a short time and pay rent while he remains is not required to give notice of an intention to quit. *Id.*
4. Where an action is brought for rent, and the answer does not admit facts sufficient to raise a presumption of a lease entitling the landlord to the rent demanded, the burden of proof is upon the landlord to establish such a lease. *Id.*

Law of the Case. See RES ADJUDICATA, 2.

Levy. See EXECUTIONS, 1.

Libel. See CONTEMPT, 1, 2.

Libel and Slander.

The alienation of the affections of a husband or wife resulting from the circulation of slanderous reports is a proper element of damage in an action for slander. *Case v. Case*... 493

Liens. See EQUITY, 5. JUDGMENTS. MORTGAGES.

Lighting Systems. See MUNICIPAL CORPORATIONS, 7-10.

Limitation of Actions. See MUNICIPAL CORPORATIONS, 18.

1. The disability of plaintiff during a portion of the time allowed for the performance of conditions precedent to suit does not extend the period, where a reasonable time remains after disability ceases. *City of Hastings v. Foxworthy*..... 677
2. Limitation as a defense must be pleaded in the answer, where it is not apparent from the petition that the action is barred. *Hanna v. Emerson*..... 709

Loan Companies. See CORPORATIONS, 4, 5.**Mandamus.**

1. A writ of *mandamus* will issue only when the right to require the performance of the desired act is clear. *State v. Bowman*..... 752
2. Where an official bond, sufficient in form and substance, is rejected, the remedy of the officer presenting it is *mandamus* to compel the proper officer to approve it. *McMillin v. Richards*..... 787

Marriage. See BREACH OF PROMISE TO MARRY.**Married Women.** See CONFLICT OF LAWS.**Master and Servant.** See PRINCIPAL AND AGENT, 6.

1. A servant who incurs the risk of appliances which, though dangerous, he may safely use by the exercise of reasonable skill and caution, does not, as a matter of law, assume the risk of injury from an accident resulting from the master's negligence. *Lee v. Smart* 318
2. A master who relies on the defense that a servant assumed the risk of employment must show that the tools or appliance furnished were reasonably safe, or if unsafe, that the danger was obvious. *Kearney Electric Co. v. Laughlin*, 391
3. The following instruction was approved: "If the danger was unusual and not incident to the employment, and the employe had no knowledge of the unusual danger, and could not with ordinary care and prudence have discovered it, he would not be deemed to have consented to incur such unusual risk." *Id.*..... 392
4. It is error to instruct the jury if they find from the evidence that the servant was exposed to unusual or extraordinary danger it would be negligence on part of the master. *Id.*
5. Evidence set out in opinion *held* sufficient to support a finding that the negligence of the employer was the proximate cause of the death of the employe. *Id.*..... 391

Master and Servant—concluded.

6. The master is not liable for an injury to a brakeman resulting solely from the negligence of another brakeman while they are working together on the same railroad train. *Chicago, B. & Q. R. Co. v. Howard*..... 570
7. The happening of an accident through the displacement of a coupler of a certain design is not sufficient proof that the design of appliance is defective where the displacement was caused by a negligent and reckless act. *Id.*
8. Two brakemen employed on the same railroad train are fellow-servants. *Id.*
9. Where services of a surgeon possessing ordinary knowledge and skill in his profession are voluntarily procured for an injured employe by his employer, the latter is not liable for the negligence or malpractice of the surgeon in absence of a reason to suspect that either would result. *Id.*

Maxims.

1. "Where one of two innocent persons must suffer loss by the fraud or misconduct of a third, he who has enabled the third person to occasion the loss must be the person who shall suffer." *Union P. R. Co. v. Johnson* 66
Scroggin v. Johnston..... 723
2. "*Falsus in uno, falsus in omnibus.*" *Stoppert v. Nierle*..... 107

Mechanics' Liens.

Sufficiency of evidence to show that the owner of realty, through a person in the employ of claimants for a lien, contracted with the latter for work subsequently performed by them. *Blazer v. Rogner*..... 588

Metropolitan Cities. See MUNICIPAL CORPORATIONS.**Misconduct of Attorney.** See CONTINUANCE, 2.**Misjoinder.** See PARTIES.**Mistake.** See JUDGMENTS, 6. SUBROGATION, 4.**Mortgages.** See APPEAL BONDS, 5, 6. BANKS AND BANKING. CHATTEL MORTGAGES. CORPORATIONS, 4. EXECUTIONS, 3-5. JUDGMENTS, 6. JUDICIAL SALES. RECEIVERS, 1.

1. Where the purchaser of mortgaged land assumes and agrees to pay the mortgage debt, he is personally liable and such liability may be enforced by the mortgagee or his assigns. *Hare v. Murphy*..... 809
2. The proofs required to establish a deficiency judgment

Mortgages—continued.

- against the purchaser of mortgaged premises must be such as would enable the mortgagee to maintain against the former an action for the amount of the mortgage debt. *Green v. Hall* 89
3. Where a deed conveying mortgaged land merely recites the existence of the mortgage and that it is part of the purchase price, assumption by the grantee of the mortgage debt cannot be established by proof of a subsequent oral promise without consideration to pay it. *Id.*
 4. Recitals in a deed conveying mortgaged land that the deed is subject to the mortgage and that the mortgage is part of the purchase price do not establish the grantee's assumption of the mortgage debt. *Id.*
 5. The fact that a junior mortgagee, after obtaining a decree of foreclosure, purchased, before judicial sale, the first mortgage, does not, as against the mortgagor, entitle the former to apply the surplus proceeds of the judicial sale on the first mortgage. *Hooper v. Casteller* 68
 6. A decree rendered in a foreclosure suit is not a bar to mortgagor's right to have the surplus proceeds of the sale paid to him in lieu of his homestead. *Id.* 69
 7. Effect of failure to register a mortgage. *Grand Island Banking Co. v. Costello* 138
 8. Judgment for plaintiff on a supplemental petition to recover money paid to insure the mortgaged property after bringing a foreclosure suit, *held* to be unsupported by the evidence. *Havemeyer v. Paul* 373
 9. The mortgagor has no ground to complain because a decree of foreclosure draws seven per cent interest, where the mortgage provides for payment of six per cent before maturity and ten per cent thereafter. *Id.* 374
 10. When a first mortgage is satisfied the second mortgage becomes the first lien on the land. *Rice v. Winters* 518
 11. An intending purchaser or mortgagee of land must take notice of the mortgage records, and when he relies upon recitals of an abstract of title he does so at his peril. *Id.*
 12. One relying upon the record entry of a release not made by the mortgagee is bound at his peril to know that the person who released the mortgage had authority to do so. *Id.*
 13. A waiver of the right to foreclose a mortgage upon default in payment of interest is not binding, where the only consideration to support it is the payment of another install-

Mortgages—concluded.

- ment of interest past due. *Baldwin Investment Co. v. Bailey* 580
14. Upon return of the sheriff's report of a sale under mortgage foreclosure, personal judgment and execution for any deficiency may be awarded by the court. *Flentham v. Steward* 640
15. A deed absolute in form will be treated as a mortgage when it is given to secure payment of a debt, though the parties may have agreed that upon default of payment the deed should become absolute. *State Bank of O'Neill v. Mathews* 659
16. Where one takes an absolute deed to land as security for a note, assigns the note, and to secure payment thereof gives the assignee a mortgage on the land, the mortgage will be treated as an assignment of the security acquired by the assignor under his deed. *Id.*
17. In the absence of a stipulation to the contrary, different holders of the notes secured by a mortgage are entitled to share *pro rata* in the distribution of the fund realized from foreclosure. *Id.*
18. An assignment of one of several notes secured by a mortgage is an assignment *pro tanto* of the mortgage. *Id.*
19. Where several notes are secured by a mortgage, the fact that those first to mature were transferred before the remaining notes were assigned does not imply an agreement that those first transferred should have preference. *Id.*
20. Where a judgment at law has been rendered for the debt secured by a mortgage, a suit to foreclose cannot be brought until an execution on the judgment has been returned unsatisfied, the return of an attachment pending the action not being sufficient. *Hargreaves v. Menken* 668
21. The pendency of proceedings against garnishees upon a judgment for the debt stays foreclosure. *Id.*
22. To prevent foreclosure it is not necessary that proceedings at law should have been instituted upon the notes secured by the mortgage, proceedings to recover the same debt being sufficient. *Id.*
23. Evidence as to release and payment. *Burlingim v. Baders*, 673

Municipal Corporations. See OFFICE AND OFFICERS, 5.
STATUTES, 3.

1. A city may be liable for injuries to private property resulting from an overflow of water during a heavy rain,

Municipal Corporations—continued.

- where it graded a street, filled up a natural drain and was negligent in failing to provide suitable outlets. *City of Beatrice v. Leary*..... 149
2. Building dikes and making ditches in the streets of a city were held to be ministerial acts. *Id.*..... 151
 3. The question as to the negligence of a city in constructing drainage ditches in the streets was held to be for the jury in an action for damages by a citizen whose property had been inundated, *Id.*
 4. Sufficiency of evidence to sustain a verdict for plaintiff in a suit for damages resulting from the failure of a city to provide suitable outlets for water where a natural drain had been closed in improving a street. *Id.*
 5. Negligence may be imputed to a municipal corporation and it may be liable for resulting damages, where the mayor and council adopt an insufficient or defective plan of drainage. *Id.*
 6. A municipal corporation is not charged with the duty of providing drainage for private property within its limits to prevent an inundation caused by one who obstructs a water-course by filling his own lot to conform to the established grade of a street. *City of Beatrice v. Knight*..... 546
 7. The power conferred upon cities of the second class having over five thousand inhabitants, to provide for and regulate the lighting of streets, implies the power to erect and maintain an electric lighting system for that purpose. *Christensen v. City of Fremont*..... 160
 8. From the power of a city to provide for and regulate the lighting of streets no power can be implied to erect or maintain a lighting system for the purpose of supplying light for private buildings. *Id.*
 9. The power to erect and maintain a lighting system for the purpose of supplying light to private buildings is conferred upon cities of the second class having over five thousand inhabitants by ch. 19, Session Laws, 1889. *Id.*
 10. A city may use for the purpose of erecting a lighting system unappropriated general funds on hands, though the law authorizing such a system provides for the levy of a tax and the issuing of bonds for that purpose. *Id.*
 11. A city of the second class having more than five thousand inhabitants may, with the sanction of a majority of the electors, make a special appropriation by an ordinance other than the annual appropriation bill. *Id.*..... 161

Municipal Corporations—concluded.

12. In order to recover damages against a city on account of the change of grade of streets, the plaintiff must have either a legal or equitable estate in the property injured. *City of Nebraska City v. Northcutt* 456
13. A husband who has erected improvements on the land of his wife, and is in possession thereof, is not entitled to recover in his own name for damages sustained to said property by a change of grade. *Id.*
14. A municipal corporation has no power to issue bonds in aid of a work of internal improvement unless expressly authorized by statute to do so. *Brinkworth v. Grable* 647
15. A city in issuing bonds has no authority to issue and deliver interest coupons maturing before a tax for payment can be lawfully levied and collected, and such coupons are void even in the hands of an innocent purchaser. *Id.*
16. Where it is the duty of the auditor of public accounts to register municipal bonds having attached thereto interest coupons maturing before a tax for payment can be lawfully levied and collected, he should detach such coupons when the bonds are registered. *Id.*
17. Evidence examined, and held to sustain a judgment annexing certain adjacent lots to a city of the second class. *City of Wahoo v. Tharp* 563
18. One injured as a result of negligence of a city of the second class having more than five thousand inhabitants cannot maintain an action against it for damages where he failed to file a statement in the office of the city clerk within six months from the date of injury. *City of Hastings v. Foxworthy* 676
19. The time allowed for filing with the city clerk a claim for injuries resulting from negligence of the city is not extended by plaintiff's disability during a portion of the period, where a reasonable time remains after disability ceases. *Id.* 677
20. The provision of ch. 10, Session Laws, 1895, for the appointment of fire and police commissioners for the city of Omaha within thirty days from the passage of the act refers to the time when the act took effect, three calendar months after the adjournment of the legislature. *State v. Bemis* 725

Murder. See HOMICIDE. JURY, 2.

Names. See CRIMINAL LAW, 7.

Navigable Waters.

Navigable waters include those waters only which afford a channel for useful commerce, whether the beds thereof are public or private property, and without regard to the influence of the ocean tide. *Clark v. Cambridge & Arapahoe Irrigation & Improvement Co.*..... 798

Negligence. See CARRIERS, 4. MASTER AND SERVANT. MUNICIPAL CORPORATIONS, 1, 3, 18, 19.

1. In an action to recover damages for personal injuries resulting from negligence, plaintiff need not plead the precautions he took to avoid injury. *Chicago, B. & Q. R. Co. v. Putnam.*..... 440
2. Where a lot contains a pond or dangerous excavation the owner is not required to fence or guard it for the protection of strangers who may go upon the premises, without invitation, for amusement or curiosity. *Richards v. Connell.*..... 467
3. A verdict for negligence may be supported by inference when the inference is the logical, probable, and reasonable deduction from proved or conceded facts. *Kearney Canal & Water Supply Co. v. Akeyson.*..... 635

Negotiable Instruments. See ALTERATION OF INSTRUMENTS. CONFLICT OF LAWS. DAMAGES, 5. FORGERY, 3. INTEREST. MORTGAGES, 16-19. USURY.

1. An accommodation maker is one who executes commercial paper without consideration in order to enable the payee or holder to thereby obtain credit. *Peoria Mfg. Co. v. Huff.*..... 7
2. One who executes a promissory note as surety for another is not an accommodation maker. *Id.*
3. Payment of money on a note at a bank where it is made payable, when the note has not been left there and is not produced, is not a payment of the note. *First Nat. Bank of Omaha v. Chilson.*..... 257
4. A blank indorsement, as between the original parties, may be modified by parol. *True v. Bullard.*..... 410
5. Where judgment has been rendered on a note against the payee who indorsed it in blank, he cannot maintain an action against a subsequent indorser before paying at least a part of the judgment. *Id.*
6. The contract created by law on part of one who purchases a note indorsed to him in blank by the payee is that the former will present the note to the maker for payment at

Negotiable Instruments—concluded.

maturity and notify the indorser within a reasonable time in case of default. *Id.*

7. A payee of a note who indorses it in blank before maturity and delivers it to the purchaser becomes liable to the latter for payment, in absence of an agreement to the contrary, in case the note is not paid by the maker when presented at maturity. *Id.*
8. Where usury is the defense to a note the burden is upon the plaintiff to show that he is a *bona fide* purchaser. *Vail v. Van Doren*..... 451
9. One who before maturity absolutely guaranties payment of a note becomes liable upon default of the maker, and the neglect of the holder of the note to bring suit does not discharge the guarantor, though the maker meanwhile becomes insolvent. *Fleatham v. Steward*..... 641
10. Where a defendant under a general denial urged but one ground for the avoidance of the effect of his indorsement, he should not urge non-liability on a different ground in an error proceeding. *Graves v. Norfolk Nat. Bank*..... 840
11. Evidence discussed in opinion held insufficient to show that the holder of a note extended the time of payment without the consent of the indorser. *Benton v. German-American Nat. Bank*..... 850

New Trial. See REVIEW, 32, 35, 42.

1. Refusal to grant a new trial was sustained in the appellate court in a case where the party aggrieved failed to object to certain testimony, alleged surprise, and did not move for a continuance. *McMurtry v. Blake*..... 219
2. "Misconduct," as used in the provision (Code, sec. 314) for new trials in civil actions, does not necessarily imply an evil or corrupt motive on the part of the jury or prevailing party. *Chicago, St. P., M. & O. R. Co. v. Deaver*... 307
3. Exceptions to rulings in giving and refusing instructions are unavailing on review unless specifically assigned in the motion for a new trial. *Hamilton v. Goff*..... 339
4. A verdict cannot be impeached by affidavits of the jurors. *Gran v. Houston*..... 815
5. The statements of an affidavit in relation to the misconduct of a juror held insufficient. *Id.*..... 871
6. A motion for a new trial will not be sustained on account of newly-discovered evidence, unless it would be sufficient to render clear what was before doubtful or of so controlling a nature as to probably change the verdict. *Id.*

Notice. See APPEAL BONDS, 7. LANDLORD AND TENANT, 3. PLEADING, 4-8. SUMMONS.

Novation. See ELECTION OF REMEDIES, 1. MORTGAGES, 1. SUBSCRIPTION, 1.

Where the purchaser of the business of one who employed a servant for a definite time at a fixed rate retains the servant for several months and pays him the wages he formerly received, this is such evidence of novation as to charge the purchaser with the obligations of the contract of employment. *Culbertson Irrigating & Water Power Co. v. Wildman*..... 663

Nuisance. See DISORDERLY HOUSES.

An injunction to restrain defendants from operating a gambling house was properly denied where plaintiff was a private individual and failed to prove special injury on account of the nuisance. *Hill v. Pierson*..... 503

Objections. See EXECUTIONS, 4. TRIAL, 12, 14.

Office and Officers. See CONSTITUTIONAL LAW, 8. MUNICIPAL CORPORATIONS, 5.

1. The provision of sec. 7, art. 7, ch. 83, Comp. Stats., for the hearing by the board of public lands and buildings of charges against certain officers did not repeal the provision authorizing the governor to remove for cause the superintendent of the hospital for the insane at Lincoln. *State v. Hay* 321
2. The governor in removing officers for cause exercises administrative functions, and his orders in the exercise of such power are not reviewable by the courts. *Id.*..... 322
3. The limit of judicial interference in such cases is to protect public officers, removable for cause only, in their right to a hearing upon specific charges. *Id.*
4. Findings set out in opinion held to sustain an order of the governor removing the superintendent of the hospital for the insane at Lincoln. *Id.*
5. In the absence of a statutory provision to the contrary, the presence of all members of a public board is not essential to the transaction of business. *State v. Bemis*..... 725
6. An officer *de jure* is one clothed with the full legal right and title to an office. *McMillin v. Richards*..... 787
7. One claiming to be county treasurer is not a *de jure* officer where the county board rejected his bond and refused to approve it. *Id.*..... 786
8. In a suit for fees against a *de facto* officer plaintiff, in order to recover, must allege and prove that he is the *de jure* officer. *Id.*

Official Bonds. See CLERK OF DISTRICT COURT.

Overruled Cases. See TABLE, *ante*, p. xlvii.

Parties. See JUDGMENTS, 10. PARTNERSHIP, 3. PLEADING, 7. QUI TAM ACTIONS. SUMMONS, 2, 4.

A purchaser who, by novation, became liable upon the vendor's contract to employ a servant for a definite time at a fixed rate cannot complain because judgment was also rendered against the vendor in an action by the servant for wages; nor can misjoinder in such a case be raised by demurrer or objection to evidence. *Culbertson Irrigating & Water Power Co. v. Wildman* 663

Partition. See JUDGMENTS, 2.

Partnership. See FRAUDULENT CONVEYANCES, 5.

1. Where a partner, during the existence of the partnership, enters into a contract within the scope of the partnership business, the firm will be bound thereby. *Farmers & Merchants Ins. Co. v. Malone* 302
2. After a partnership has been dissolved and the accounts settled according to the books of the firm, one partner may sue another partner at law for a share of money received by the latter who kept the books and failed to charge himself with the receipt of such money. *McAuley v. Cooley*... 582
3. Where a summons runs against defendants individually, their firm relation being stated in the petition and summons as *descriptio personarum*, the suit is not one against the partnership but against the individual members. *Hanna v. Emerson*..... 708

Payment. See PRINCIPAL AND AGENT, 2. SUBROGATION.

Insufficiency of evidence to show payment of a note. *First Nat. Bank of Omaha v. Chilson*..... 257

Penalties. See STATUTES, 5.

An informer cannot maintain an action in his own name to recover a penalty unless authorized to do so by statute. *Omaha & R. V. R. Co. v. Hale*..... 418

Personal Injuries. See INSTRUCTIONS, 3. MASTER AND SERVANT, 1, 9.

Physicians and Surgeons.

1. Evidence of employment. *Mitchell v. Jones*..... 55
2. A surgeon is required in the exercise of his profession to employ only that degree of knowledge and skill ordinarily possessed by other surgeons. *Chicago, B. & Q. R. Co. v. Howard* 570

Pleading. See DEATH BY WRONGFUL ACT. LANDLORD AND TENANT, 4. LIMITATION OF ACTIONS, 2. NEGLIGENCE, 1. OFFICE AND OFFICERS, 8. QUIETING TITLE.

1. Under sec. 120 of the Code the attorney at law for a corporation may verify its pleadings. *Beatrice Rapid Transit & Power Co. v. German Nat. Bank*..... 147
2. Where suit is brought upon a note by the pledgee thereof, evidence that plaintiff took other security and agreed to release the note is inadmissible under an answer that the debt for which the note was pledged had been paid. *First Nat. Bank of Omaha v. Chilson*..... 257
3. Objection that a pleading does not state a cause of action or defense should be made in the trial court and assigned in the petition in error. *Pearce v. McKay*..... 296
4. Notice of a cross-bill of a defendant in an action *in rem* is a proceeding in the cause and interlocutory in character. *Patten v. Lane*..... 333
5. Where part of the defendants in a foreclosure suit file pleadings after answer day asserting liens, they should notify the adverse parties in interest. *Havemeyer v. Paul*, 373
6. A defendant, upon whom service has been made, is only chargeable with notice of such answers as his co-defendants file within the statutory time. *Id.*..... 374
7. In a suit to foreclose a mortgage the owner of the equity, after answering the petition, is not charged with notice of an answer filed after answer day by co-defendants who claim liens on the property. *Id.*..... 373
8. In a suit to foreclose a mortgage it is error to permit plaintiff to file after answer day, without notice to defendant, a supplemental petition to recover money paid for insurance. *Id.*
9. Where defendant files an answer, he is bound to take notice of the reply thereto. *Id.*
10. The want of a material allegation in a petition may be waived by a failure to challenge attention to it in the trial court. *O'Donohoe v. Polk*..... 510
11. In a suit for wages under a special contract, an averment that plaintiff has performed all the conditions thereof so far as defendant permitted is a sufficient averment of performance unless attacked by motion. *Culbertson Irrigating & Water Power Co. v. Wildman*..... 664
12. On demurrer, judgment should go against the party whose pleading was first defective in substance. *Hawthorne v. State*..... 871

Pleading—concluded.

13. An order allowing an amendment will not be interfered with on review, except for an abuse of discretion on part of the lower court. *Kleckner v. Turk* 177
14. The court may, during a trial, grant leave to amend the petition where the nature of plaintiff's claim will not be changed thereby. *Stratton v. Wood*..... 629
15. Allowing a petition to be amended so as to change the form of the action is permissible where the identity of the cause of action is preserved. *Scroggin v. Johnston*..... 714
16. In an action of ejectment, where defendant pleads a contract of purchase and demands affirmative relief, plaintiff may be permitted to amend his petition so as to change the form of action to foreclosure of the contract. *Id.*
17. The court may permit a pleading to be amended to conform to the proof. *Id.*
18. Leave to amend a pleading may be properly refused where the motion does not disclose the nature of the proposed amendment. *Camp v. Pollock*..... 772
19. Where two causes of action in a petition are identical, the defendant may have a remedy by motion to strike out one of them as surplusage. *Pollock v. Whipple*..... 844
20. New matter constituting a defense cannot be introduced under a general denial. *Gran v. Houston*..... 815

Pledges. See PLEADING, 2.

Powers. See MUNICIPAL CORPORATIONS, 7-11.

Practice. See APPEAL BONDS, 5. ATTORNEY AND CLIENT, 3. BASTARDY, 2. EQUITY, 1. INSTRUCTIONS, 1. PARTIES. PLEADING, 5, 18. RECEIVERS, 2. REMITTITUR. RES ADJUDICATA. REVIEW.

Presumption of Law. See FRAUDULENT CONVEYANCES, 3.

Principal and Agent. See INSURANCE, 3. MORTGAGES, 12. SALES, 3. SCHOOLS AND SCHOOL DISTRICTS, 5-7. TORTS.

1. A banker who receives money from the payer of a note becomes the agent of the latter and not of the payee where the note is payable at the bank but has not been left there and is not produced. *First Nat. Bank of Omaha v. Chilson*, 257
2. An agent who receives money for his principal and fails to pay it over is not liable to the payer in an action for conversion. *Mathews v. O'Shea*..... 299
3. Citation of conflicting authorities as to whether an agent

Principal and Agent—concluded.

who receives money for his principal is liable as principal to the payer. *Id.*..... 301

4. Form of action against an agent to recover money paid to him for his principal where the question of fraud is not involved. *Id.*..... 302

5. Agency cannot be proved by the acts or declarations of the alleged agent not brought home to the principal. *Richardson & Boynton Co. v. School District*..... 777

6. A master is not bound by the acts or declarations of his servant beyond the scope, or apparent scope, of the latter's employment. *Id.*

Principal and Surety. See APPEAL BONDS, 1-4, 7. CLERK OF DISTRICT COURT, 1. CORPORATIONS, 11. INTOXICATING LIQUORS, 1, 2. NEGOTIABLE INSTRUMENTS, 2, 5, 11.

1. Where a surety for the payment of a debt receives security as indemnity, the principal creditor is in equity entitled to the benefit of that security. *South Omaha Nat. Bank v. Wright*..... 23

2. In a suit to recover money paid by plaintiffs as work progressed on a church building destroyed by fire before completion, the sureties on the contractor's bond are not liable, where the owners of the building violated a provision of the contract requiring them to keep the property insured to the extent of their interest. *Gallagher v. St. Patrick's Church*..... 535

3. After a partnership has been dissolved and the accounts settled according to the books of the firm, one partner may sue the sureties on the bond of another partner with the latter who kept the books and failed to charge himself with the receipt of certain sums of money collected. *McAuley v. Cooley*..... 582

Priorities. See REVIEW, 2.

Privileged Communications. See WITNESSES, 7, 8.

Property. See NEGLIGENCE, 2.

Public Officers. See OFFICE AND OFFICERS.

Quieting Title. See ADVERSE POSSESSION.

Where a land-owner in his petition does not offer to pay to the purchaser at a tax sale the amount of the purchase price or to refund payments made for subsequent legal taxes, an invalid tax deed will not be canceled as a cloud on the former's title. *Weston v. Meyers*..... 95

Qui Tam Actions.

An informer cannot maintain an action in his own name to recover a penalty unless authorized to do so by statute.

Omaha & R. V. R. Co. v. Hale..... 418

Quorum. See OFFICE AND OFFICERS, 5.

Quo Warranto. See CORPORATIONS, 3.

1. Judgment of ouster against the superintendent of the hospital for the insane at Lincoln who was removed for cause by the governor. *State v. Hay* 322
2. Decision in relation to title of rival claimants to the offices of fire and police commissioners of the city of Omaha. *State v. Bemis*..... 731

Railroad Companies. See CARRIERS. MASTER AND SERVANT, 6, 7. MUNICIPAL CORPORATIONS, 14-16.

1. Where a railroad company, in violation of law, fails to ring a bell or blow a whistle at public crossings it forfeits to the state and not to the informer the penalty provided by sec. 104, ch. 16, Comp. Stats. *Omaha & R. V. R. Co. v. Hale* 418
2. One who informs against a railroad company for violating sec. 104, ch. 16, Comp. Stats., by failing to ring a bell or blow a whistle, cannot maintain an action in his own name for the penalty or control the action when brought. *Id.*
3. Plaintiff was injured in a collision at a railroad crossing and a verdict in his favor against the company for two hundred dollars for damages was held to be sustained by the evidence. *Chicago, B. & Q. R. Co. v. Putnam*..... 441

Receivers.

1. Applications for the appointment of receivers in cases brought in the district court should be presented there whether made before or after appeal. *Eastman v. Cain*... 48
2. Unless sufficient reasons exist the supreme court will not entertain an original application for the appointment of a receiver. *Id.*
3. The fact that a receiver has been sued without leave of court is a matter of defense for him in the action and does not render invalid the process of the court served on him nor prevent jurisdiction from attaching. *Flenham v. Steward*..... 641
4. A receiver who voluntarily enters his appearance and asks for and obtains affirmative relief thereby waives the defense of being sued without leave of court. *Id.*

Records. See EVIDENCE, 5, 6. JUSTICE OF THE PEACE, 2-4. MORTGAGES, 11.

Registration.

1. Effect of failure to register a mortgage. *Grand Island Banking Co. v. Costello*..... 138
2. It was held as a matter of law that municipal bonds were registered when presented to the auditor of public accounts, though the registration was in fact delayed for several months by injunction. *Brinkworth v. Grable* 647

Religious Societies.

1. Courts having no ecclesiastical jurisdiction will neither review nor revise the proceedings or judgments of church tribunals where questions of church discipline are alone involved. *Powers v. Budy*..... 208
2. A church organization has power to provide means for the adjustment of all matters with respect to its internal polity which do not affect the rights of the citizen or the jurisdiction of the state. *Id.*

Remittitur.

When a verdict is too large and the amount of excess appears from the record, the party who recovered the verdict, in absence of other error, may be permitted to remit the excess and have the judgment for the balance affirmed. *Culbertson Irrigating & Water Power Co. v. Wildman*..... 667.

Repeal. See STATUTES.**Replevin. See SALES, 1, 6.**

1. Plaintiff's right to recover cannot be predicated upon the failure of defendant to establish a superior right. *Johannson v. Miller* 53-
2. Where the rights of plaintiff are based solely on written leases to parties from whom he claims to have derived rights of possession superior to defendant's, the failure to offer in evidence the leases or copies will defeat the action. *Id.*
3. Where, by a special finding on sufficient evidence, there was fixed the value of replevied property upon which the mortgage of plaintiff was operative, a judgment rendered on a general verdict limited to the same amount will not be disturbed. *Citizens Nat. Bank of Grand Island v. Wedgwood*..... 143-
4. In an action by the indorsee of a note secured by a chattel mortgage to recover the chattels the evidence was held sufficient to sustain the defense that the note was materially altered without the knowledge or consent of the defendant. *Davis v. Snyder*..... 415-
5. Where defendant claims to hold the property by virtue

Replevin—*concluded*.

- of the levy of an execution regular on its face, the writ and levy thereunder will confer upon the officer no right to hold the property as against the owner, if the execution was issued upon a void judgment. *Muller v. Plue* 701
6. One claiming under a chattel mortgage must plead the facts creating his interest and right of possession. *Camp v. Pollock* 771
7. Where there is no conflict as to the amount of damages, the court may direct as to the precise amount and not leave it to the assessment of the jury. *Id.*..... 772
8. There is no presumption that a mortgagee of chattels before condition broken has any right to possession as against the mortgagor. *Id.*
9. A mortgagee of chattels cannot maintain replevin against a stranger unless as between the parties to the mortgage plaintiff has the right of possession. *Id.*
10. As a rule the rights of parties to an action of replevin must be determined by the facts as they existed when suit was instituted. *Kilpatrick-Koch Dry Goods Co. v. Strauss*, 793

Res Adjudicata. See MORTGAGES, 6.

1. In a judicial district having two judges an order by one judge directing a verdict for defendant on the pleadings and evidence is not necessarily erroneous as reversing the decision of the other judge, who overruled a demurrer to the petition in the same case. *Kleckner v. Turk* 177
2. Where a judgment has been reversed on appeal and the case remanded generally and the same questions are presented on retrial, the appellate court on a second appeal may re-examine and reverse its former rulings. *City of Hastings v. Foxworthy*..... 676

Rescission. See SALES, 1, 2.**Residence**. See DOMICILE.**Review**. See APPEAL BONDS. BILL OF EXCEPTIONS. CRIMINAL LAW. HABEAS CORPUS, 1. INSTRUCTIONS, 2, 4. JUDGMENTS, 2. JUDICIAL SALES, 7. RELIGIOUS SOCIETIES, 1. TRIAL, 1, 2, 5, 11. VENUE, 1.

1. An order refusing to require the clerk of the district court to approve a supersedeas bond may be reviewed by petition in error. *State v. Baker*..... 39
2. Where plaintiff dismissed his appeal, leaving a controversy solely between defendants as to priorities of chattel mortgage liens, the defendants having stipulated that a mort-

Review—continued.

- gage to a co-defendant was first recorded, and that other mortgages were subject thereto, *held*, in the absence of facts pleaded and corresponding relief prayed entitling the junior lienors to other relief, the supreme court should not reverse the judgment below confirming the priority as stipulated. *Gilmore v. Silver*..... 632
3. Where a case has been remanded generally and the same questions are presented on re-trial, the appellate court on a second appeal may re-examine and reverse its former rulings. *City of Hastings v. Foxworthy*..... 676
4. Error not conducing to a wrong final decision is not ground for reversal. *Stratton v. Dole*..... 473
5. A ruling on a motion for a continuance will not be reversed except for an abuse of discretion. *Id.*
6. Permitting reported decisions to be read to the jury is not reversible error in absence of an abuse of discretion on part of the trial court. *Id.*
7. Where a case has been submitted without brief and oral argument the judgment may be affirmed. *Gaines v. Bonnell*..... 260
Betz v. Martin..... 341
Denney v. Denslow..... 613
8. An objection that a statute was not enacted in the constitutional mode cannot be raised for the first time in the supreme court. *Clearwater Bank v. Kurkonski*..... 1
9. Grounds for sustaining a motion will not be considered on review unless they were presented below. *Hooper v. Castetter*..... 67
10. A defendant cannot in the supreme court urge a defense not raised below. *Graves v. Norfolk Nat. Bank*..... 840
11. The supreme court will not ordinarily consider the objection that a pleading fails to state a cause of action or defense where that question was not raised below or assigned in the petition in error. *Pearce v. McKay*..... 296
12. A judgment will not be reversed on account of error in admitting evidence not prejudicial. *Peoria Mfg. Co. v. Huff*... 7
13. On appeal from a decree in an equity case it will be presumed that incompetent testimony given below was not considered by the trial court. *Buckingham v. Roar*..... 244
14. Admission of incompetent testimony in a case tried to the court is not reversible error. *Pearce v. McKay*..... 296
Tolerton v. McClure..... 368
Scroggin v. Johnston 714

Review—continued.

15. Where the bill of exceptions has not been properly authenticated, questions of fact will not be examined. *Griggs v. Harmon*..... 21
16. A verdict will not be disturbed as being contrary to the evidence where important testimony has been omitted from the bill of exceptions. *Conger v. Dodd* 36
17. Where papers are filed with a motion and are necessary to a determination thereof, the ruling on the motion will not be reviewed where the papers are not preserved by a bill of exceptions. *Fremont Butter & Egg Co. v. Peters* 356
18. Questions of fact will not be considered where the bill of exceptions was settled without authority by the clerk of the district court. *Mattis v. Connolly*..... 628
19. Where part of the charge has been omitted from the transcript for review, an assignment that a certain instruction is misleading for want of modification will not be examined. *Conger v. Dodd*..... 36
20. Assignments of error based on an order sustaining a demurrer will not be considered where the demurrer has been omitted from the transcript. *Ball v. Nelson*..... 205
21. An order of the district court refusing to strike out the pleadings because presenting issues not made before a justice from whom the case was appealed cannot be reviewed unless the record discloses the issues presented before the justice. *First Nat. Bank of Omaha v. Chilson* 257
22. Appellee may withdraw from the supreme court a transcript which he filed with a motion to quash the superseas bond before appellant's appeal had been docketed. *Kountze v. Erck*..... 295
23. The transcript is the sole evidence of the proceedings below. *Davis v. Snyder*..... 415
24. An assignment that the trial court erred in overruling a motion to strike from the files a certain paper cannot be considered upon review where neither such motion, nor the grounds thereof, appear in the record. *Barr v. State*..... 458
25. Where the record does not show a demand for a jury trial or an objection to a trial to the court, it will be presumed that a jury was waived. *Davis v. Snyder*..... 415
26. Error of a county judge in excluding testimony during the examination of complainant in a bastardy case will not affect the jurisdiction of the district court. *Stoppert v. Nierle*..... 106

Review—continued.

27. An assignment of error as to giving or refusing a group of instructions is insufficient. *Id.*..... 107
28. Exceptions to the rulings in giving and refusing instructions will be disregarded unless specifically assigned in the motion for a new trial. *Hamilton v. Goff*..... 340
29. A judgment will not be reversed for the giving of an erroneous instruction where the verdict is the only one which could have been rendered upon the issues. *Stratton v. Dole*..... 473
30. In charging a jury the repetition of a proposition of law is not reversible error where it does not perplex or mislead the jury. *Gran v. Houston*..... 813
31. The giving of an instruction assuming the existence of a fact established by undisputed evidence is not a ground for reversal. *Id.* 814
32. Assignments in a petition in error relating to errors occurring at the trial and in the rendition of judgment will not be considered where the record fails to show a ruling on a motion for a new trial. *Leach v. Renwald*..... 207
33. Allegations that there were errors in the trial below will not be considered in absence of a motion for a new trial. *Carnes v. Heimrod*..... 364
34. Where a motion for a new trial is based on several different grounds, an assignment that it was erroneously overruled is too general for consideration. *Moore v. Hubbard*.... 612
35. An objection that the findings and judgment are not supported by sufficient evidence is unavailing in an error proceeding where the record fails to show that a motion for a new trial was filed and ruled on below. *Losure v. Miller*... 465
Losure v. Thompson..... 466
36. A judgment sustained by the proofs will be affirmed where only questions of fact are involved on appeal. *Citizens State Bank of Chadron v. Bellangee*..... 203
37. Findings below supported by sufficient evidence will not be disturbed in error proceedings upon the assignment that the judgment is against the weight of the evidence. *Tolerton v. McCutere*..... 368
38. Where the record fails to present a question of law the judgment will be affirmed if supported by the evidence. *State Bank of Crawford v. Owens*..... 534
39. Findings by court or jury on conflicting evidence will

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not be disturbed on review unless clearly wrong. <i>Mitchell v. Jones</i>	55
<i>Hooper v. Castetter</i>	68
<i>Thompson v. Field</i>	146
<i>Pearce v. McKay</i>	296
<i>Farmers & Merchants Ins. Co. v. Malone</i>	302
<i>O'Donohoe v. Polk</i>	510
<i>Carstens v. Eller</i>	515
<i>Thompson v. Luke</i>	561
<i>Baldwin Investment Co. v. Bailey</i>	580
<i>B'Nai Israel v. Garneau</i>	592
<i>Moore v. Hubbard</i>	612
<i>Scroggin v. Johnston</i>	714
40. A joint assignment not good as to all plaintiffs in error who joined therein will be overruled as to all. <i>Small v. Sandall</i>	306
<i>Harold v. Moline, Milburn & Stoddard Co.</i>	618
41. Error in admitting and rejecting testimony is not available on review unless the rulings complained of are definitely pointed out in the petition in error. <i>Stoppert v. Nierle</i>	107
<i>Scroggin v. Johnston</i>	714
42. An assignment that the court erred in overruling the motion for a new trial is too indefinite where several grounds are stated in the motion. <i>Conger v. Dodd</i>	39
<i>Pearce v. McKay</i>	296
<i>Sigler v. McConnell</i>	598
43. An assignment that the court erred in admitting or rejecting evidence presents nothing for review. <i>Kearney Electric Co. v. Laughlin</i>	392
44. The assignment, "Errors of law occurring at the trial and duly excepted to," is insufficient in a petition in error. <i>Moore v. Hubbard</i>	612
45. An assignment of error is insufficient where it fails to point out the particular error objected to. <i>Quinn v. Moss</i> , 614	
46. An assignment that the district court erred in admitting the evidence of a witness will be overruled if any of his evidence was proper. <i>Kearney Electric Co. v. Laughlin</i>	392
<i>Sigler v. McConnell</i>	598

Riparian Rights.

1. Except as abrogated or modified by statute, the common law doctrine with respect to the rights of private riparian

Riparian Rights—concluded.

proprietors prevails. *Clark v. Cambridge & Arapahoe Irrigation & Improvement Co.*..... 799

2. The right of a riparian proprietor is property, and when vested can be impaired or destroyed only in the interest of the general public, upon full compensation. *Id.*

Sales. See CORPORATIONS, 7. EQUITY, 4, 5. GUARANTY. JUDICIAL SALES. MUNICIPAL CORPORATIONS, 15. NOVATION.

1. A merchant who was induced to sell goods on credit through fraud of the purchaser may rescind the contract within a reasonable time and replevy the goods. *Farwell v. Kloman*..... 425
2. The vendor of goods, in order to rescind a sale on the ground of fraud, must exercise his election to rescind within a reasonable time after the discovery of the fraud. *Smith v. First Nat. Bank of Chadron*..... 444
3. The relation existing between a wholesale merchant and one who buys goods on credit through fraud is that of debtor and creditor,—not that of principal and agent. *Farwell v. Kloman*..... 424
4. A purchaser may decline to receive a consignment where the wholesale merchant fails to deliver the quality and quantity of goods ordered, within a reasonable time. *Graves v. Morse* 604
5. The question whether a consignee accepted goods and became liable for payment is for the jury to determine from all the facts and circumstances in the case, where the goods were not shipped within a reasonable time, but were subsequently delivered. *Id.*
6. Where goods not shipped within a reasonable time are received by a clerk of the consignee and stored in the warehouse of the latter without his knowledge, and in violation of his wishes, the evidence will sustain a verdict for the consignor in an action of replevin by him to recover the goods from one who purchased, without an inventory, the entire retail stock of the consignee. *Id.*
7. A shipment of goods consigned to the seller who makes a draft for the price and attaches the bill of lading thereto is a tender of delivery at the place to which the goods are shipped, and not at the place of shipment. *Van Valkenburgh v. Gregg*..... 654
8. The fact that a buyer received a portion of the goods consigned to the seller at a place designated was a waiver

Sales—concluded.

- only of the terms of delivery as to the goods so received, and not as to those not shipped. *Id.*
9. A seller of goods cannot recover damages on account of the refusal of the purchaser to accept, unless he tenders delivery of the goods in accordance with the contract. *Id.*
 10. Where a written contract specifies a place of delivery, delivery must be tendered at that place. *Id.*
 11. Construction of, and evidence of compliance with, a contract of sale for delivery of goods at either of two places, the seller to ship from either place to the buyer at a place designated by the latter. *Id.*
 12. Whether statements made by a seller as to the condition of property offered for sale were intended to be warranties, is a question of fact for a jury. *Erskine v. Swanson*..... 767
 13. A seller may become a warrantor by using language amounting to an assertion that the property is as represented, though he does not use the word "warrant." *Id.*
 14. A person who buys personal property from a conditional vendee thereof, with knowledge of the conditions, is not an innocent purchaser. *Pollock v. Whipple*..... 844

Satisfaction. See CHATTEL MORTGAGES, 1-3.

Schools and School Districts.

1. Secs. 32, 33, 34, and 35, ch. 9, Comp. Stats., providing for issuance of bonds, do not empower a school district to issue its bonds to parties in compromise, or to take the place, of an indebtedness evidenced by school district warrants or orders. *State v. Moore*..... 13
2. The electors of a school district alone have power to direct the building of a school house. *Mizera v. Auten*..... 239
3. A district board has no power to appropriate the funds of a school district to the erection of a school house unless authorized to do so by a vote of the electors. *Id.*
4. Where a school district has raised sufficient money to build a school house, has the funds in its treasury and owns a site, it may, at any regular annual meeting, or at a special meeting called for the purpose, direct the building of a school house on such site, and that payment therefor be made from the funds on hand. *Id.*
5. The electors of a school district may designate the school board as the agent of the district to superintend the construction of a school house. *Id.*

Schools and School Districts—concluded.

6. The school board has authority to make contracts for, and superintend the erection of, a school house ordered to be built, where the electors of the district failed to designate an agent for that purpose. *Id.*
7. The electors of a school district may select to superintend the construction of a school building such person or persons as will best subserve the interests of the school district. *Id.*

Seals. See TAXATION, 5.

Self-Defense. See CRIMINAL LAW, 11, 12. HOMICIDE, 5.

Sentence. See CRIMINAL LAW, 4.

Set-Off and Counter-Claim.

Sufficiency of evidence to sustain a finding against a tenant for life who pleaded a counter-claim for payments on mortgages in a case where she was sued by the reversioner for damages for waste. *Disher v. Disher*..... 100

Sheriffs and Constables. See JUDICIAL SALES. REPLEVIN, 5.

Slander. See LIBEL AND SLANDER.

Special Findings. See TRIAL, 1, 2.

Stare Decisis. See RES ADJUDICATA, 2.

State and State Officers. See OFFICE AND OFFICERS.

Statute of Frauds. See TRUSTS.

Statutes. See CONSTITUTIONAL LAW. JUDGMENTS, 11.
TABLE, *ante*, p. li.

1. In construing statutes the purpose should be to ascertain the intention of the legislature. *State v. Moore*..... 12
2. Where a law is plain and free from ambiguity no interpretation is necessary. *Id.*..... 13
3. Where, from an analysis of a whole act providing for the issuance of bonds by minor political subdivisions of the state, the meaning and intent is doubtful, the doubt should be resolved in favor of the taxpayers. *Id.*
4. Where the words of a statute are plain, direct, and unambiguous, an interpretation is unnecessary. *Stoppert v. Nierle*..... 106
5. A statute is penal where it creates a liability for violating its provisions not measured or limited by the damage caused by performing or omitting a requirement of the act. *Kleckner v. Turk*..... 176

Statutes—continued.

6. A right of action which accrued under a statute and did not otherwise exist is destroyed by the repeal of the statute in absence of a saving clause. *Id.*..... 177
7. A suit pending to enforce a right or remedy conferred solely by statute is abated by the unconditional repeal of the statute. *Id.*
8. A statute treating of a subject in general terms, and not expressly contradicting positive provisions of a prior act, will not be construed as a repeal by implication of the latter if any other reasonable construction can be adopted. *State v. Hay*..... 321
9. Though the action created by ch. 21, Comp. Stats., is purely a creature of the statute, the courts will not give the statute a technical or narrow construction. *Kearney Electric Co. v. Laughlin*..... 391
10. Sec. 104, ch. 16, Comp. Stats., requiring railroad companies to ring bells or blow whistles at public crossings is penal. *Omaha & R. V. R. Co. v. Hale*..... 418
11. The word "repealed" in sec. 11, art. 3, of the constitution, relating to amendment of laws, is used therein in the sense in which it was understood when the constitution was adopted. *State v. Bemis*..... 724
12. Before the adoption of the constitution it was settled as a rule of construction that the simultaneous repeal and reenactment of a statute in terms, or in substance, is a mere re-affirmance of the original act, and not a "repeal" in the strict or constitutional sense of the term. *Id.*
13. It is only required by sec. 11, art. 3, of the constitution, in relation to amending laws, that the amendatory act shall be definite and certain as to the law amended, and germane to the original act. *Id.*
14. An act embracing the entire subject-matter of a prior act and also additional provisions will be construed as a repeal of the latter by implication. *Id.*..... 725
15. A provision in a statute without an emergency clause, for the appointment of certain officers within thirty days from the passage of the act, was held to refer to the time the law went into effect, three calendar months after the adjournment of the legislature. *Id.*
16. All presumptions are in favor of legislative acts. *Id.*..... 731
17. An act will not be declared invalid unless plainly and irreconcilably in conflict with the constitution. *Id.*
18. A court in construing a statute should consider its policy

Statutes—concluded.

- and the mischief to be remedied, and give the interpretation best calculated to advance the design of the legislature. *Gran v. Houston*..... 814
19. A proviso which would operate to limit the application of an enacting clause, general in its terms, will be strictly construed, and includes no case not within the letter of the exception. *Paxton & Hershey Irrigating Co. v. Farmers & Merchants Irrigation Co.*..... 885
20. The power conferred by the Rayner irrigation law of 1889 upon irrigating companies for acquiring the right of way for canals and ditches is within the title of the act, and is not in conflict with sec. 11, art. 3, of the constitution relating to titles of bills. *Id.*..... 884

Stock. See CORPORATIONS, 7, 8.

Stockholders. See CORPORATIONS, 1-3.

Subrogation. See TAXATION 1.

1. The right of subrogation not resting on contract, but being a mere equitable right, whether the doctrine should be applied depends upon the circumstances of each case. *South Omaha Nat. Bank v. Wright*..... 23
Rice v. Winters..... 517
2. One cannot be subrogated to the rights of a third person until he has paid a debt due the latter. *Rice v. Winters*... 517
3. The right of subrogation is never accorded to one who is a mere volunteer in paying a debt of one person to another. *Id.*
4. A third mortgagee who loaned the mortgagor the money with which the first mortgage was paid and satisfied, believing that a marginal release on the record of the second mortgage was valid, when in fact it was not, should not be subrogated to the rights of first lienor. *Id.*
5. Courts of equity will not apply the doctrine of subrogation where it will deprive a party of a legal right. *Id.*..... 518
6. Sureties on a contractor's bond, after a building in course of construction has been destroyed by fire, may be subrogated to the rights of the owner in the insurance on the property, where they were compelled to pay him the sums he advanced under a building contract requiring him to carry insurance to the extent of his interest in the property. *Gallagher v. St. Patrick's Church*..... 535

Subscription.

1. Where a subscription paper, payable to a certain person,

Subscription—concluded.

is assigned by him to one of the subscribers, the latter may recover directly from another subscriber who is delinquent. *Ripp v. Hale*..... 567

2. A page of a deed record in such a case was *held* to have been properly excluded from the evidence, as not affecting the liability of defendant upon the subscription. *Id.*

3. The evidence in such a case was *held* sufficient to sustain a verdict for plaintiff where the defense was alteration of the instrument. *Id.*

Summons. See APPEARANCE, 4. JUDGMENTS, 5, 10. JUSTICE OF THE PEACE, 2-4. PLEADING, 5-7.

1. Sufficiency of evidence to establish the place of leaving a summons as that of the usual place of residence of defendant who was absent from the state with the intention of returning. *Wood v. Roeder*..... 311

2. Where a transitory action is properly brought in a county, summons may issue to any other county to bring in other parties defendant. *Hanna v. Emerson*..... 708

3. Service of summons in an action against individual members of a firm is governed by sec. 69 of the Code, authorizing service to be made by delivering a copy to a defendant or by leaving it at his usual place of residence. *Id.*

4. In a personal action, service upon a nominal defendant in the county where suit is brought does not confer authority for bringing a real defendant from another county by a summons directed to that county and served there. *Id.*

5. To entitle a party to the issuance of an alias summons, it is not essential that he should refile the petition or file a new one. *Id.*..... 709

Supersedeas Bonds. See APPEAL BONDS.

Suretyship. See PRINCIPAL AND SURETY.

Surface Water.

A land-owner may defend his premises against surface water by dike or embankment, but is liable for damages where he negligently or unnecessarily constructs an embankment and overflows the land of an adjoining proprietor. *City of Beatrice v. Leary*..... 149

Taxation. See MUNICIPAL CORPORATIONS, 11, 15, 16.

1. A purchaser at an invalid tax sale has a lien on the realty for the taxes paid and is subrogated to the rights of the public. *Weston v. Meyers*..... 95

Taxation—concluded.

2. A public tax levied on real estate becomes a lien until paid or barred. *Id.*..... 96
3. As between a tenant for life and the reversioner the former should pay taxes assessed against the estate. *Disher v. Dishier* 100
4. One who sells land after April 1, in any year is, under sec. 44, ch. 77, Comp. Stats., liable for the taxes on such real estate for that year. *Campbell v. McClure* 609
5. Valid tax deeds cannot be executed because the law does not provide for an official seal for county treasurers. *Dickey v. Paterson*..... 848

Tender. See SALES, 7, 9, 10.

Torts. See CARRIERS, 2.

A person who interferes with personal property not his own, at the instance of another, who is not the owner, is liable to the owner for the wrongful act. *Cook v. Monroe*..... 349

Towns. See VILLAGES.

Township Bonds.

County commissioners have no jurisdiction to order an election for the purpose of voting on a proposition to issue township bonds for internal improvement until a petition signed by at least fifty freeholders of the township has been presented. *Hoxie v. Scott* 199

Transcripts. See BILL OF EXCEPTIONS, 4. CRIMINAL LAW, 2. REVIEW, 19-23.

Transitory Actions. See SUMMONS, 2.

Trial. See ATTORNEY AND CLIENT, 3. CONTINUANCE, 3. CRIMINAL LAW. EQUITY, 1. HOMICIDE, 9. INSTRUCTIONS. JURY. RES ADJUDICATA, 1. REVIEW, 10, 13. WITNESSES.

1. A special finding will not be assumed to be in conflict with the general verdict of the jury. *Citizens Nat. Bank of Grand Island v. Wedgwood* 143
2. A special finding, though clearly unsustained by the evidence, must be disregarded when the fact established by it is clearly irrelevant to the issues. *Id.*
3. The admission of incompetent or irrelevant testimony in a trial without a jury is not reversible error. *Pearce v. McKay*..... 296
Tolerton v. McClure..... 368
Scroggin v. Johnston 714

Trial—concluded.

4. Error cannot be predicated upon the exclusion of certain testimony where the same was subsequently admitted. *Farmers & Merchants Ins. Co. v. Malone*..... 302
5. The admission of evidence which, though not competent, is immaterial affords no grounds for the reversal of a decree in equity. *Blazer v. Rogner*..... 588
6. Where a jury returns an incomplete or defective verdict, it is proper for the court to send it back under proper instructions for its completion or correction. *Smith v. First Nat. Bank of Chadron*..... 444
7. Permitting reported decisions to be read to the jury is a subject within the discretion of the trial court. *Stratton v. Dole*..... 473
8. Argument of counsel based on facts not in evidence is not reversible error if made in reply to similar argument of the adverse party. *Id.*..... 474
9. Where defendant's attorney in his opening statement, with permission of the court and against plaintiff's objections, rehearses matters foreign to the issues and which tend to excite the prejudice of the jury, a judgment for defendant may be reversed. *Stratton v. Nye*..... 619
10. Where the district court abuses its discretion in conducting the routine business of a trial the judgment may be reversed. *Id.*
11. The refusal of the court to permit a witness to answer a question cannot be made a ground of error in absence of an offer of the proof an answer would elicit. *Alter v. Covey*... 508
12. Where a responsive answer is received without objection, it is discretionary with the court to sustain or overrule a motion to strike out the answer as incompetent. *Gran v. Houston*..... 816
13. A party desiring to review proceedings in relation to the misconduct of an attorney should at the time object to the conduct and obtain a ruling on the objection. *Id.*
14. To make error available in the admission of evidence there must be an objection to its admission and an exception to the ruling on the objection. *Id.*

Trover and Conversion. See PRINCIPAL AND AGENT, 2.

The refusal of a common carrier to surrender goods in its possession to the rightful owner amounts to conversion, for which the latter may recover if entitled to possession at the time of the demand therefor. *Shellenberg v. Fremont, E. & M. V. R. Co.*..... 487

Trust Funds. See EQUITY, 5.

Trusts. See CORPORATIONS, 4, 5. FRAUDULENT CONVEYANCES, 5.

Where several persons furnish money, buy land, and have it conveyed to one of their number in trust for all, one who contributed to the fund may enforce the trust in equity in an action against the trustee. *Leader v. Tierney*..... 753

Ultra Vires. See BANKS AND BANKING.

Usury.

1. Where a note bearing the highest lawful rate of interest is antedated as a device to cover usury, and the money is not set aside by the lender for the use of the borrower during the time between the date of the note and the payment of the money, the transaction is usurious. *Vail v. Van Doren*..... 450
2. A transaction providing for a loan at ten per cent, where a seven per cent note is given, and an advance payment of interest deducted from the loan, which with the interest on the note does not exceed ten per cent, is not usurious. *Guthrie v. Hamilton Loan & Trust Co.*..... 766

Variance. See CRIMINAL LAW, 2.

Vendor and Vendee. See CONTRACTS, 4. MORTGAGES, 1, 11. PARTIES. PLEADING, 16. TAXATION, 4. TRUSTS.

A deed unrecorded at the time of the rendition of a judgment, if recorded before execution sale thereunder, is superior to the sheriff's deed. *Hargreaves v. Menken*..... 668

Venue. See CORPORATIONS, 6. CRIMINAL LAW, 13. GARNISHMENT.

1. A ruling on a motion for a change of venue will not be disturbed in the supreme court except for an abuse of discretion of the trial court. *Stoppert v. Nierle*..... 106
2. An action on an account against two or more persons may be brought in the county in which any one of the defendants at the time resides or may be summoned. *Hanna v. Emerson*..... 708
3. Where an action on an account against two or more persons is not instituted in a county where a defendant resides, it must be brought in the county where he then is, and summons must be served upon him there. *Id.*

Verdict. See TRIAL, 6.

Verification. See PLEADING, 1.

Villages.

The boundaries of a village may, under sec. 99, ch. 14, Comp. Stats., be extended so as to include adjacent lands in such close proximity to the platted portion as to have some unity of interest therewith in the maintenance of municipal government. *City of Wahoo v. Tharp*..... 563

Voluntary Assignments. See EQUITY, 5.

Waiver. See CONTRACTS, 3. MORTGAGES, 13. PLEADING, 10. REVIEW, 25. SALES, 8.

Warranty. See GUARANTY. SALES, 12, 13.

Waste.

1. A life tenant who does not damage or diminish the value of the inheritance may remove timber so as to fit the land for pasture or cultivation. *Disher v. Disher*..... 100
2. The reversioner in an action to stay threatened waste by a tenant for life may recover for waste previously committed where there is some connection between the injury done and the acts threatened. *Id.*
3. Sufficiency of evidence to sustain the allegation of waste by a reversioner against a tenant for life. *Id.*

Water and Water-Courses. See NAVIGABLE WATERS. SURFACE WATER.

In a suit against a canal company for damages to crops by the overflow of a canal resulting from the negligence of defendant in maintaining its embankments the evidence was held sufficient to justify a verdict for plaintiff. *Kearney Canal & Water Supply Co. v. Akeyson* 635

Witnesses. See CRIMINAL LAW, 9, 10. EVIDENCE, 4. INDICTMENT AND INFORMATION. REVIEW, 46.

1. Instruction as to credibility of a witness held properly refused, for the reason that it misstated the maxim, "*Falsus in uno, falsus in omnibus.*" *Stoppert v. Nierle*..... 107
2. Where a husband is a nominal defendant, having no interest adverse to that of his wife, in an action by her to cancel a fraudulent conveyance executed by both to a third person the wife is a competent witness in her own behalf. *Buckingham v. Roar*..... 244
3. In such a case neither the husband nor the wife should testify as to any conversation which occurred between them with reference to the subject-matter of the suit. *Id.*
4. In such a case testimony of the husband tending to sustain the conveyance is incompetent as being adverse to the interest of the wife. *Id.*

Witnesses—concluded.

5. Neither husband nor wife can be examined in any case as to any communication made by the one to the other while married, nor shall they after the marriage relation ceases be permitted to reveal in testimony any such communication made while the marriage subsisted. *Id.*
6. Where defendant in a criminal prosecution becomes a witness in his own behalf, his interest in the result of the trial may be shown for the purpose of affecting his credibility. *Baye v. State*..... 261
7. A communication from a party to an attorney is not privileged where the relation of attorney and client did not exist between them. *Id.*..... 262
8. Where a client makes statements to his counsel in the presence and hearing of a third person who stands in no relation of confidence to either, such person may testify to the statement. *Id.*..... 263
9. Statements made by a witness out of court in conflict with his testimony at the trial may be shown in cross-examination. *Fremont Butler & Egg Co. v. Peters*..... 356
10. Evidence set out in opinion held admissible for the purpose of impeachment. *Stratton v. Dole*..... 473
11. Case where a witness was permitted to testify after disobeying an order excluding witnesses from the court room. *Gran v. Houston*..... 816

Words and Phrases.

1. "Deliberation." *Debney v. State*..... 866
2. "Misconduct." *Chicago, St. P., M. & O. R. Co. v. Deaver*... 307
3. "Navigable waters." *Clark v. Cambridge & Arapahoe Irrigation & Improvement Co.*..... 798
4. "Pecuniary injuries." *Kearney Electric Co. v. Laughlin*... 391
5. "Repeal." *State v. Bemis*..... 724
6. "Wholly dependent." *Kearney Electric Co. v. Laughlin*... 391

Writs. See EXECUTIONS. SUMMONS.

